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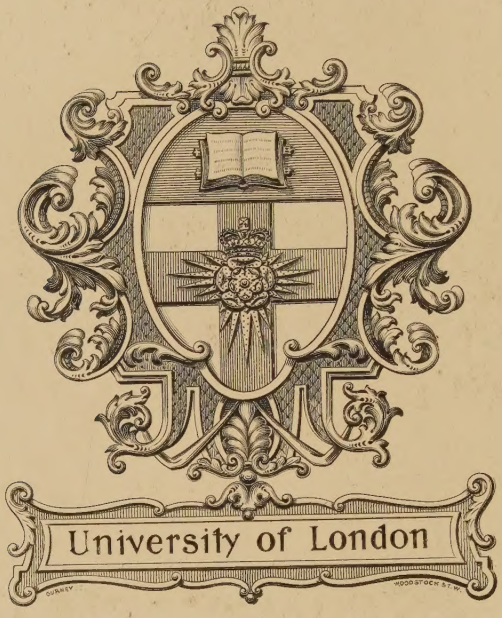

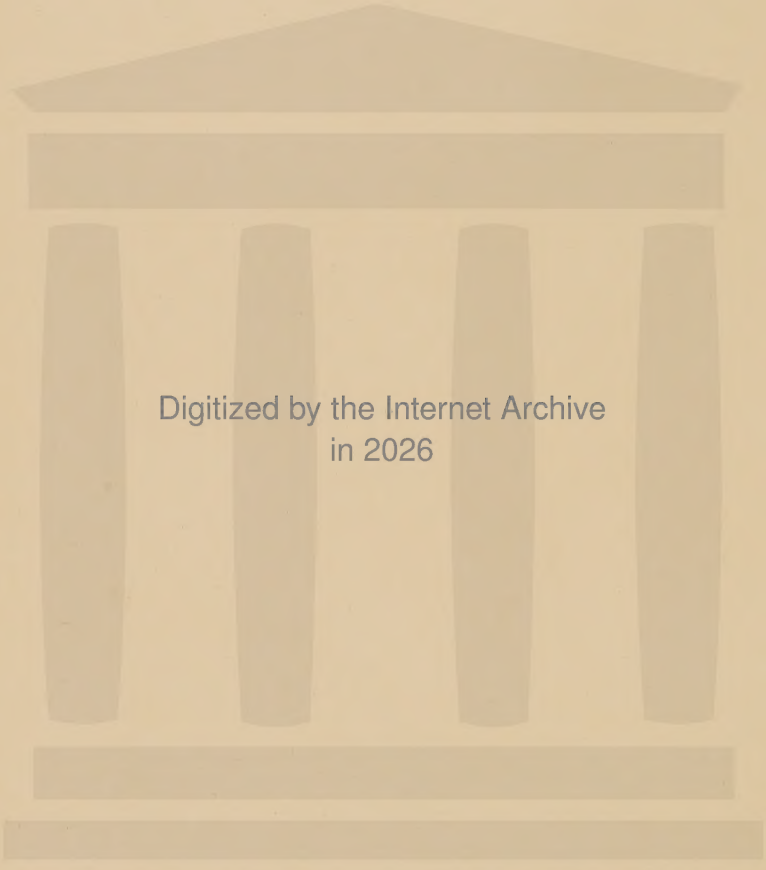
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1915.

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29	19	"*Le Caux* v. *Eden*, reported in note to *Lindo* v. *Rodney*."	"*Lindo* v. *Rodney*, reported in a note to *Le Caux* v. *Eden*."
33	27-29	"Lord Thurlow, quoted with approval by Lord Stowell in *The Ostermeyer* and referred to in *The Two Friends*."	"Lord Thurlow, in *The Ooster Eems*, quoted with approval by Lord Stowell in *The Two Friends*."

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DETERMINED BY THE

PROBATE, DIVORCE AND ADMIRALTY DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

ECCLESIASTICAL COURTS.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(In Prize.)

1914

Oct. 29;
Nov. 9.

THE MÖWE.

[1914 No. 21.]

Prize Court—Owner of Enemy Merchant Ship—Practice—Right to appear—Vessel in Enemy "Port" at Outbreak of Hostilities—Vessel encountered and captured "at sea"—Hague Convention No. VI., 1907.

The question whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise, is not a matter of international law, but of the practice of the Court, and, as by Order XLV. of the Prize Court Rules, 1914, in cases not provided for by the Rules, "the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the President may direct":—

Held by the President (Sir Samuel Evans), that the practice of the Court shall be, that whenever an alien enemy conceives that he is

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THE MÖWE.

entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his claim before this Court, the grounds of his claim being stated in the affidavit to lead to appearance required to be filed under Order III., r. 5, of the above Rules.

Shortly after the declaration of war between Great Britain and Germany, a German merchant sailing vessel, owned by her master, a German subject, was captured in the Firth of Forth by one of His Majesty's cruisers and taken into Leith. It was contended on behalf of the Crown that the vessel was captured "at sea." On the other hand, it was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and, therefore, was not confiscable, but only liable to detention :—

Held by the President, that the vessel was captured "at sea" and liable to condemnation as lawful prize, for the word "port," as used in the Hague Conventions, does not mean the "fiscal" port, which may cover a considerable area and include other ports, but must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking, and, therefore, the vessel was not seized in any "port" so as to limit the right of the captor to detention only, and the question whether the vessel was in territorial waters at the time of seizure was not material.

THE *Möwe* (1) was a merchant sailing vessel, of the port of Rhandermoor, in Germany. Her master was Harm Schier, a German subject. He was also the sole owner of the vessel. She was captured by H.M.S. *Ringdove* on August 5 last in the Firth of Forth and taken into Leith. Her ship's papers showed that she was a German vessel, and had sailed from Norderney in Germany, and that her destination was Bo'ness, in the Forth. The master in an affidavit deposed that he was bound for Morrison's Haven for coal. That statement is not accurate, but in the circumstances it is not material to any issue. He arrived near Morrison's Haven somewhere between 7 and 9 o'clock on the evening of August 4. At this time hostilities between this country and Germany had not begun. The declaration of war was made as from 11 P.M. on that day. He came to anchor about a mile off the creek of Morrison's Haven. He had a conversation with the officer of customs of this place; his account of it differs from that of the customs' officer. Again, this is not

(1) This statement of facts is taken from the judgment of the President.

material to any question in issue. If it were, I accept the latter's account. The master, in his affidavit, seems to make some point of what he alleged took place, but no argument was based upon this at the trial. Early in the morning of August 5 he weighed anchor and proceeded under way, according to his account, for Granton, a port about eight miles higher up the Firth of Forth than Morrison's Haven. After being under way for about an hour, the vessel was captured as prize by H.M.S. *Ringdove*, when —to use the words in the affidavit of her master—"she was in British territorial waters between Morrison's Haven and Granton." In a subsequent paragraph he said the vessel was "taken at sea." It was not shown that the master knew of the outbreak of war when the vessel was captured, and, for the purposes of this case, it is assumed that he did not know. An appearance was entered in these prize proceedings by Harm Schier "as owner of the vessel."

1914. Oct. 29. *Sir John Simon, A.-G., T. Erskine Holland, K.C.*, and *Norman Bentwich*, for the Crown, claiming condemnation of the vessel as lawful prize. The *Möwe* was captured "at sea," and the argument which will be raised on behalf of her owner that she can only be detained during the continuance of the war, on the ground that she was seized in port shortly after the outbreak of hostilities, is inadmissible, for the context shows that the word "port" as used in the Hague Conventions (e.g. No. VI., arts. 1, 2, 3), or in the Declaration of London, and for prize purposes, is limited to a port in the popular sense, where a vessel can load and unload, and has no reference to a "fiscal" port, which may cover a considerable area and include other ports, as the port of Leith, for fiscal purposes, actually does. This view of the popular meaning of the word agrees with the use of the word for insurance purposes: see the definition of the word by Lords Halsbury and Watson in *Hunter* v. *Northern Marine Insurance Co.* (1)

As to the right of an alien enemy to appear in the Prize Court, and as to his position, in such cases as that before the Court, being rather that of plaintiff than defendant, the Attorney-

(1) (1888) 13 App. Cas. 717, at pp. 722, 733.

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General referred to *Robinson* v. *Continental Insurance Co. of Mannheim* (1) and contended that the result of the authorities would seem to be that (1.) where an owner avowed his enemy character without qualification, he had not a persona standi in judicio and was not a person who had a right to be heard; but (2.) where a person avowed that he was a subject of the enemy State in general, but had ground for urging that pro hac vice he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard. On these points *Erskine Holland, K.C.*, following the Attorney-General, submitted (1.) that, in respect of enemy plaintiffs the rule excluding them had prevailed in all British Courts, and such claimants as the owner of the *Möwe* were quasi-plaintiffs; (2.) that the comparatively simple questions raised by enemy claimants were safe with the Bench and the Bar; (3.) that the rule of exclusion is one of procedure, and is unaffected by relaxations in substantive law, as in the case of the Declaration of Paris, or the Orders in Council as to days of grace; (4.) that the non-observance by other countries, such as Russia or Japan, or, it may be, by the United States of America, of this British rule is irrelevant to its authority here.

C. R. Dunlop, for the owner of the *Möwe*, did not accept the definition given by the Attorney-General of the word "port," and contended that, for prize purposes, it was used to mean any place within which the officer of customs had power to seize, and was used in contradistinction to "high seas," so that this vessel was, at all material times, "in port," and, on seizure, liable to detention only, or, alternatively, she was in territorial waters, and not on the high seas with a like result.

In this particular case the owner cannot be said to be an enemy resident in, or carrying on business in, an enemy country for he, as master of the vessel, was interned here, and, therefore, the arguments on behalf of the Crown as to the position of the owner were outside the present case, no claim having been made, and the appearance of the owner being simply to secure the detention only, and not the condemnation of his ship; but, apart from the question of the temporary status of the owner, he was in fact in a similar position to the claimant in *The Fenix*

(1) (1914) 31 Times L. R. 20.

1914

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(*Phœnix*) (1), where the only objection taken was that the appearance was not in proper form.

The principle of allowing a person in the position of the owner of the *Möwe* to appear was assented to in the United States of America: see *The Pedro* (2); *The Guido* (3); *The Buena Ventura* (4); *The Panama* (5); and *The Paquete Habana.* (6) [All these cases are referred to in the judgment of the President, as well as the cases arising out of the Russo-Japanese war upon which counsel also relied.]

Cur. adv. vult.

Nov. 9. THE PRESIDENT (SIR SAMUEL EVANS). [After stating the facts already set out, the learned President continued:]

The first question which arises for decision is whether, in the particular circumstances of this case, Schier, an admitted enemy subject and the owner of an enemy merchant ship, has a right to appear as a claimant in the proceedings; or whether he should be given such a right in order to assert whatever privileges he deems to be conferred upon him by the sixth Hague Convention of 1907.

The second question to be determined is: whether the vessel was in an enemy port and not allowed to leave at the commencement of hostilities, or whether she was encountered and captured at sea within the meaning of the sixth Hague Convention of 1907. Assuming the question to depend upon the Convention, in the former case the vessel is only to be detained and not confiscated in accordance with arts. 1 and 2; in the latter she is subject to condemnation, as Germany made a reservation with respect to art. 3 and is not a party to it.

Pending the decision upon the first question, I allowed counsel (who was instructed to appear for the enemy owner) to present his arguments fully as amicus curiæ upon the two questions to be decided.

The question of the right to appear naturally comes first. I have already dealt with this matter in one of its aspects in *The*

(1) (1854) 2 Eng. P. C. 238.
(2) (1899) 175 U. S. 354.
(3) (1899) Ibid. 382.
(4) (1899) Ibid. 384.
(5) (1900) 176 U. S. 535.
(6) (1900) 175 U. S. 677.

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Marie Glaeser. (1) In that case an appearance in the proceedings was entered for the enemy owners, but at the hearing no one came forward to represent them. It was obvious that no ground could be shown either under the Hague Convention or otherwise against the ship's capture and condemnation; and I ordered the appearance to be struck out both on the ground of the insufficiency of the affidavit upon which the appearance was founded, and on the ground that there were no substantial special circumstances which could be put in any other affidavit in support of any valid claim.

In the case now before the Court, although the affidavit of the claimant is not very aptly drawn to set forth a claim, it is contended that he is entitled under the said Hague Convention to appear to resist condemnation of his vessel, and to secure that the vessel be subjected only to a decree of detention without compensation during the war, or requisition upon making compensation. I will assume that the affidavit sufficiently disclosed the special circumstances in which this contention is put forward. I will also assume that the Hague Convention referred to is in force and applicable. Upon this a word will be said later.

I referred in *The Marie Glaeser* (1) to some decisions of Lord Stowell and Dr. Lushington, and I will not repeat them. There are other decisions to the like effect, e.g., in *The Falcon* (2), where, in the following passages, Lord Stowell deals with the disabilities of citizens of a hostile State in this Court, and of citizens of this country in the Courts of an enemy :—

"He is, it seems, invested with the character of the American Consul at Bordeaux; and certain it is that an American Consul resident in France is subject to all the disabilities of a French merchant, as to the power of becoming a claimant in this Court. . . . .

"But I am to recollect who the persons are from whom the objection comes. They are British subjects, who could have no persona standi there (i.e., in French Courts), and could not have been parties to the proceedings either in the Court of Leghorn, or Paris, without stating themselves out of court. It was impossible

(1) [1914] P. 218, at pp. 221–223.
(2) (1805) 6 C. Rob. 194, at pp. 197, 199.

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that the proceedings could be otherwise conducted; and, therefore, I cannot think that the absence of the parties, which is urged as a fundamental defect, is material in such a case. It is nothing more than what takes place here in cases of common condemnations, which do not rest solely on the effect of the monition, but pass on a view of the evidence of the case. The enemy proprietor is necessarily absent by operation of law, and yet the sentence is completely valid, as well against him as against all the world."

All the forms since the days of Sir William Marriott, Lord Stowell's predecessor, down to the present day accord with the principle and practice promulgated by Lord Stowell in *The Hoop*. (1)

These are followed in some of the forms appended to the recent Prize Court Rules, 1914. See Form 13, where this paragraph appears: "There were at the time of such capture no contraband goods on board the said ship, and no subject of (insert the name of Government at war with Great Britain) or enemy of Great Britain had at the time of such capture, or at any other time material to the matters in this cause, any share, right, title, or interest in the said ship or cargo, or any part thereof." Far be it from me to wish to decide on mere matters of form, unless compelled thereto by the law; I only cite them to illustrate the principles and practice.

A claimant in a Prize Court is not in a position analogous to that of a defendant; but rather to that of a plaintiff. In the writ the owners of a vessel are not made defendants. But I wish to avoid complicating this case with any discussion of the position or rights of alien enemies in legal proceedings in the King's Bench or our other municipal courts.

The principle upon which the Prize Court in the times of Lord Stowell and Dr. Lushington proceeded was that no one who was a subject of the enemy could be a claimant unless under particular circumstances that pro hac vice discharged him from the character of an enemy, such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the King's peace pro hac vice. Otherwise, such a person was regarded as totally ex lege. In the words of Mr. Justice

(1) (1799) 1 C. Rob. 196. See Marriott's Formulary (1802), passim.

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Story, in his authoritative work on Prize Courts, an enemy cannot "interpose a claim unless under the protection of a flag of truce, a cartel, licence, pass, treaty, or some other act of the public authority suspending his hostile character." (1) In this passage Story J. adopted the words of Lord Stowell in *The Hoop* (2), adding by way of illustration the words "licence" and "treaty."

In his argument the Attorney-General submitted two propositions as embodying the result of the authorities in this Court, namely:—

(1.) Where an owner avowed his enemy character without qualification, he had not a persona standi in judicio and was not a person who had a right to be heard; and

(2.) Where a person avowed that he was a subject of the enemy State in general, but had ground for urging that pro hac vice he stood in a position which relieved him from the pure enemy character, he was entitled to appear and to be heard; and that the real question was under which of these two rules a German owner should be regarded when he came before the Court. In my opinion, that submission is well founded and accurate.

Practical illustrations of the second proposition were frequently afforded in the time of the Crimean War, when claimants appeared on the ground of the immunity of their ships from capture by reason of the Order in Council dated March 29, 1854. This Order in Council is set out at page iii., Appendix D, in Spinks's Prize Cases. That Order allowed six weeks to Russian merchant vessels in any ports or places within the British dominions for loading their cargoes and departing from such ports or places; and also gave permission to such Russian vessels if met at sea by any of Her Majesty's ships to continue their voyage if their cargoes had been taken on board before the expiration of the six weeks. The Order also granted permission to any such Russian vessels which, prior to its date, should have sailed from any foreign port bound for any port or place in the British dominions to enter and discharge their cargoes, and afterwards forthwith to depart without molestation; and if met at sea to continue their

(1) Pratt's Story (1854), p. 21.
(2) 1 C. Rob. 196.

voyage to any port not blockaded. In short, the Order in Council exempted entirely from capture Russian merchant vessels in the special circumstances therein specified.

Claimants whose vessels were within the special terms of the Order therefore brought themselves within the category of persons who were within the Queen's peace pro hac vice, and who were relieved from their enemy character, or had their hostile character suspended during the operation of the Order in Council. They were accordingly heard as claimants in the Prize Court.

Reference was made in argument to cases in the American Courts arising during the Spanish-American War in 1898. Upon examination it will be found that in almost all the cases where enemy claimants were heard at that time, their claims arose in circumstances very similar to those in the class of proceedings already referred to which came before the British Prize Court during the Crimean War.

At the outbreak of the war between the United States of America and Spain the President of the Republic issued, on April 26, 1898, a proclamation exempting Spanish ships from capture in terms practically identical with the Queen's Order in Council exempting Russian ships forty-four years earlier. Articles 4 and 5 of the President's proclamation were obviously framed upon the British Order in Council of 1854.

Following upon this proclamation of the President the cases cited before me came before the United States Courts. *The Pedro* (1) turned upon arts. 4 and 5 of the proclamation. *The Guido* (2) simply followed *The Pedro* (1). *The Buena Ventura* (3) depended upon the application of art. 5 of the proclamation. *The Panama* (4) was also decided upon arts. 4 and 6 of the proclamation. The other case cited, namely, *The Paquete Habana* (5), did not depend upon the provisions of the proclamation; but it is to be observed that the claim there put forward, and decided, was also that the vessel was "exempt from capture." There may be other cases which I have not been able

(1) 175 U. S. 354.
(2) Ibid. 382.
(3) Ibid. 384.
(4) 176 U. S. 535.
(5) 175 U. S. 677.

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to examine in which enemy claimants were allowed to appear in the United States Courts, and there may be regulations touching the matter which I have not seen. But the authorities cited fall short of showing that in the United States any claimant who avowed an enemy character has been allowed generally to appear in their Prize Courts.

In argument before me counsel for the enemy owner also compendiously referred to cases which were heard during the Russo-Japanese War in 1904—1905 and reported in the Russian and Japanese Prize Cases, vol. I., p. 182, and vol. II., pp. 1, 12, 39, 46, 52, 92, 95, 116, and 354.

Upon examination of these cases again it appears that they dealt with claims either of neutrals or of claimants whose contention was that their property was entirely immune from capture and from sentence of condemnation. In most of them the claim was founded (no doubt amongst other grounds) upon the Japanese Imperial Ordinance No. 20 of February 9, 1904, which allowed days of grace to certain Russian vessels upon the same lines as the British Order in Council of 1854 and the United States Proclamation of 1898. (See Ordinance, Appendix C, vol. II. of Russian and Japanese Prize Cases, p. 445.) In *The Tetartos* (vol. I., 166), in the Russian Prize Court, the original claimants were the neutral owners of a German ship which the Russian cruiser captured and sank. It was ultimately held that the ship was wrongfully sunk. Thereupon the liquidator of what was apparently a Japanese company (the Teshio Timber Company of Otaru), the owners of the cargo which was in the captured ship and was also wrongfully sunk, made a claim which was allowed. The other cases reported in the pages referred to in vol. II. were heard in the Japanese Prize Courts.

In *The Ekaterinoslav* (II., 1) the owners of a Russian vessel claimed exemption from capture on grounds (inter alia) coming within the Days of Grace Ordinance (No. 20) already referred to.

The Mukden (II., 12), *The Rossia* (II., 39), and *The Argun* (II., 46) were also cases in which exemption was claimed (amongst other grounds) under the same Ordinance.

In *The Manchuria* (II., 52) and *The Lesnik* (II., 92) the same

Ordinance was relied upon, and in the former case a claim was made on behalf of neutral insurers.

The claim in *he Kotik* (II., 95) was for exemption as a fishing vessel and also under Ordinance 20.

In *The Thalia* (II., 116) the vessel was seized near a repairing dock, and the basis of the claim was that she was property "on land" and therefore exempted from capture.

And in *The Orel* (II., 354) the capture was said to be wrongful as the vessel was a hospital ship and therefore immune, but it was held notwithstanding that she was guilty of hostile acts and therefore subject to condemnation.

I have dealt briefly with these cases, because reliance was placed upon the liberty which was said to be given by the Russian and Japanese Prize Courts to enemy claimants, as adding force to the rights asserted on behalf of enemy owners in this Court.

In each of the cases, however, which I have examined complete immunity was claimed as I have said.

As to Russia I observe that art. 60 of the Regulations relating to Naval Prizes (1895) deals with "original owners of the captured property" in general terms; but I cannot say how these words would be construed.

All the cases mentioned were of course before the Hague Conventions of 1907.

Under the Hague Convention (No. VI.) the attitude which the owner in the present case must take may shortly be stated in these terms:

"I admit that I am an alien enemy; and therefore that my ship was lawfully captured or seized as being enemy property; but I wish to appear to put forward and argue my claim that in the circumstances of my case the ship is not confiscable and cannot be condemned; but can only be detained during the war, to be restored to me after the war."

Applying the principles laid down by Lord Stowell and Dr. Lushington, I am satisfied that in their day they would not have allowed the enemy owner to appear to assert such a claim. There is no coming pro hac vice within the King's peace; there is no suspension of the hostile character. As to what those eminent

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judges would have done if they lived in the present day I will not hazard a conjecture.

As before indicated, I desire to say a word as to whether the Hague Convention (No. VI.) is operative and applicable. I cannot close my eyes to the provision in art. 6 of the Convention, which reads as follows: "The provisions of the present Convention do not apply except between contracting Powers, and then only if all the belligerents are parties to the Convention." By arts. 7 and 9 the Convention requires to be ratified by the signatory Powers; and by art. 8 non-signatory Powers may accede to the Convention. Similar articles appear in the other Conventions enumerated hereafter.

Of the belligerents in the present war, at the time of the capture of the vessel, Germany and Austria-Hungary, and Belgium, France, Great Britain, Japan, and Russia had ratified the Convention (Germany and Russia making reservations of art. 3 and part of art. 4).

Of the other belligerents, Montenegro and Serbia (whose representatives signed the Convention) have not ratified it.

Turkey, who is now also belligerent, has not ratified it.

None of these States were non-signatory Powers, so there has been no accession on the part of any of them.

In strictness therefore (apart entirely from the question whether the enemies of this country are acting under or in accordance with the Convention) it is not clear that the Convention is binding or applicable.

It is not my function or province to do anything more than to declare the law. But I trust to be forgiven for a humble expression of opinion that it would accord with the traditions of this country if such steps were taken as may be necessary to make operative a series of Conventions solemnly agreed upon by the plenipotentiaries of forty-five States or Powers after most careful deliberation, with the most beneficent international objects.

I am not required finally to determine the effect or the binding character of the Conventions. This Court would be mainly concerned with the sixth, seventh, tenth, and eleventh of them as dealing more directly with maritime concerns: although, incidentally, others of them, e.g., the third, eighth, and thirteenth, might come

under consideration in proceedings before it. Of the belligerents, Montenegro has no navy, and, so far as I know, no mercantile marine—it has a coast line, but only of about thirty miles; and Serbia is a purely inland State, having no seaboard at all. It would scarcely seem desirable that the non-ratification by these Powers should prevent the application of the Maritime Conventions; and it may be that the counsellors who have the responsibility of advising the Crown may deem it fit to advise that by proclamation or otherwise this country should declare that it will give effect to the Conventions, whether by the literal terms thereof they are strictly binding or not.

Having premised so much, I will now consider whether the owners of an enemy vessel have a right, or should be given the right, to appear to put forward a claim under the Hague Conventions, assuming, as was done during the argument, that they are operative.

Under some of the Conventions, some degree of protection and relief is given in respect of vessels which are not wholly immune from capture at sea or seizure in ports, e.g., under the sixth Convention the consequences of seizure or capture are minimized and limited in certain cases, although complete immunity is not afforded.

Under others of the Conventions some vessels are entirely exempted from capture. For instance, under the tenth Convention hospital ships are free from capture, except in certain specified circumstances; and under the eleventh Convention certain coast fishing vessels and local trading boats, as well as those employed on religious, scientific, or philanthropic missions, are similarly exempted.

With regard to vessels comprised within the tenth and eleventh Conventions the cases which might arise would approach nearly to those of vessels which come within the protection afforded by the Order in Council of 1854.

Dealing with the Hague Conventions as a whole the Court is faced with the problem of deciding whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise,

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Mr. Holland argued that this is a matter not of international law, but of the practice of this Court. That view is correct.

I think that this Court has the inherent power of regulating and prescribing its own practice, unless fettered by enactment. Lord Stowell from time to time made rules of practice, and his power to do so was not questioned.

Moreover, by Order XLV. of the Prize Court Rules, 1914, it is laid down that "in all cases not provided for by these Rules, the practice of the late High Court of Admiralty in England in prize proceedings shall be followed, or such other practice as the President may direct."

The Rules do not provide for the case now arising.

I therefore assume that as President of this Court I can give directions as to the practice in such cases as that with which the Court is now dealing.

The practice should conform to sound ideas of what is fair and just. When a sea of passions rises and rages as a natural result of such a calamitous series of wars as the present, it behoves a Court of justice to preserve a calm and equable attitude in all controversies which come before it for decision, not only where they concern neutrals, but also where they may affect enemy subjects.

In times of peace the Admiralty Courts of this realm are appealed to by people of all nationalities who engage in commerce upon the seas with a confidence that right will be done. So, in the unhappy and dire times of war, the Court of Prize as a Court of justice will, it is hoped, show that it holds evenly the scales between friend, neutral, and foe.

A merchant who is a citizen of an enemy country would not unnaturally expect that when the State to which he belongs, and other States with which it may unhappily be at war, have bound themselves by formal and solemn conventions dealing with a state of war like those formulated at the Hague in 1907, he should have the benefit of the provisions of such international compacts. He might equally naturally expect that he would be heard, in cases where his property or interests were affected, as to the effect and results of such compacts upon his individual position. It is to be remembered also that in the international commerce

of our day the ramifications of the shipping business are manifold, and others concerned, like underwriters or insurers, would feel a greater sense of fairness and security if, through an owner (though he be an enemy), the case for a seized or captured vessel were permitted to be independently placed before the Court.

For the considerations to which I have adverted, and in order to induce and justify a conviction of fairness, as well as to promote just and right decisions, I deem it fitting, pursuant to powers which I think the Court possesses, to direct that the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant and to argue his claim before this Court. The grounds of his claim should be stated in the affidavit to lead to appearance which is required to be filed by Order III., r. 5, of the Prize Court Rules, 1914.

I will now proceed to deal with the substance of the claim of the owner in the present case. He contends that his vessel cannot be condemned as prize.

Was his vessel captured at sea or seized in port?

It was argued for him that she was seized in port and therefore ought only to be detained during the war.

For the Crown, on the other hand, it was contended that the vessel was captured at sea, and ought to be condemned.

I have sufficiently stated the facts.

It was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and therefore is not confiscable. (See art. 3 of the sixth Hague Convention, 1907, to which Germany did not agree, and under which her citizens cannot benefit.) In this Convention I am of opinion that the word "port" must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking.

It does not mean the fiscal port. The ports of Morrison's Haven, Granton, and Bo'ness, I was informed, are within the

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fiscal port of Leith, but they are all separate ports in the ordinary sense. The vessel was not seized in any of such "ports" as the term is so understood, and as it seems to me to be used in the Convention.

She was not in a port from which, if days of grace had been arranged, she could be said to "depart" ("sortir").

Alternatively, it was alleged but not proved that she was taken in "territorial waters," and that, therefore, she was not captured on the high seas. But I will assume that she was within territorial waters when the capture was made. In my view that is wholly immaterial.

The sixth Hague Convention does not refer to "territorial waters." A vessel might be in territorial waters for scores of miles either innocently or nefariously, and pass numerous ports without any intention to enter any of them. It is idle to say that on this account she would be free from capture.

Where the Hague Conventions intend to deal with territorial waters, they are expressly mentioned as distinguished from port; e.g., in Convention XII., arts. 3 and 4, and Convention XIII., arts. 2, 3, 9, 10, &c., the words "les eaux territoriales" are used in contradistinction to "les ports." (Cf. also the Declaration of London, art. 37, where territorial waters are described as "les eaux des belligerents.") "En mer," which is the phrase used in art. 3 of the sixth Convention, is also inapt to indicate "territorial waters."

Then it was contended that the vessel could not be condemned because she was not captured on "the high seas."

The words "encountered on the high seas" in art. 3 are not an accurate rendering of the authoritative French "rencontrés en mer."

Where the Conventions intend to describe "upon the high seas" the appropriate phrase "en pleine mer" is used. (See Convention VII., recital.) Another phrase, "en haute mer," is used in the Declaration of London, art. 37, to signify the same thing.

To illustrate the meaning of the word "port" in the Conventions I would further observe that the word "ports" is used in various places in conjunction with, but in contradistinction to,

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roadsteads and to territorial waters. See Convention XIII., where the words "les ports, les rades, ou les eaux territoriales" are frequently used.

In my view the claimant in his affidavit was accurate when he said his vessel was "taken at sea." The words of art. 3 "rencontré en mer" are exactly applicable to this case. And I have no hesitation in finding that she was captured at sea and not seized in port.

I therefore decree that the vessel be condemned as lawful prize.

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for the owner of the *Möwe*: *Stokes & Stokes.*

T. L. M.

[IN THE COURT OF APPEAL.]

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BASS *v.* BASS.

Divorce—Petition on Ground of Wife's Adultery—Denial—Alimony pendente lite—Allegation by Husband of Maintenance of Wife by Co-respondent—Denial on Affidavit by Wife—Application by Husband to cross-examine Wife and file Evidence in Petition for Alimony—Leave granted on Condition that no Question be put or Evidence filed going to Issue of Adultery.

The husband filed a petition for divorce on the ground of the wife's adultery. By her answer the wife denied the adultery and made a counter-charge of cruelty. She then filed a petition for alimony pendente lite, which the husband answered by alleging that the wife was being maintained by the co-respondent. The wife filed an affidavit denying this, and an order for alimony pendente lite was made by the registrar. On the application of the husband an order was made by Bargrave Deane J. suspending the order for alimony and giving the husband leave to cross-examine the wife on her affidavit and to file further evidence. The wife appealed on the ground that to allow the cross-examination upon an interlocutory proceeding would prejudice the fair trial of the issue of adultery in the divorce suit.

The Court of Appeal varied the order by directing that the leave to cross-examine and file further evidence should be subject to the

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condition that no question should be put in cross-examination or affidavit filed or used which directly or indirectly went to the issue of adultery.

APPEAL from an order of Bargrave Deane J. directing that an order made by a registrar on August 7, 1914, for the payment of alimony pendente lite to the appellant should be suspended, and that the appellant should be cross-examined upon an affidavit filed by her in reply to the respondent's answer to her petition for alimony; and that the respondent should have leave to file further evidence in support of his allegation that at the date of the petition for alimony the appellant was being maintained by the co-respondent.

A petition for dissolution of the marriage between the parties was filed by the husband on April 15, 1914, on the ground of the adultery of the wife. On June 17, 1914, the wife filed an answer denying adultery and charging the husband with cruelty. On May 20, 1914, the wife filed a petition for alimony pendente lite, and on June 3, 1914, the husband filed an answer thereto. On June 17 the husband took out a summons for leave to file a supplemental petition and a further answer to the petition for alimony pendente lite. This summons came on for hearing with the petition for alimony on June 24, when counsel for the husband asked for leave to file a further answer alleging that the wife was being maintained by the co-respondent at the date of the petition for alimony. The matter having been adjourned to enable him to do so, on July 1 he filed a further answer in which he swore that the wife was living and cohabiting with the co-respondent and was being maintained by him. On July 30 the wife filed a reply denying that she was living or cohabiting with the co-respondent and that she was being maintained by him. On August 7, 1914, the matter came before the registrar, when counsel for the husband applied for leave to cross-examine the wife on her reply, or to file further evidence. The registrar refused the husband's application and made an order for the payment of interim alimony at the rate of 250*l.* a year. The husband then took out a summons asking that the registrar's order should be rescinded and that an order be made directing that the wife should be cross-examined on her affidavit and that the husband

should have leave to file further evidence. This summons came before the Vacation judge, who adjourned it to be dealt with by the judge of the Probate Division. On October 20 it came before Bargrave Deane J., who made the order now appealed from.

Barnard, K.C., and *T. Bucknill*, for the appellant. The order appealed from is bad. Alimony is for the maintenance of the wife pending the trial of the issue in the suit: *Wells* v. *Wells*.(1) If this order is allowed to stand the issue of adultery will in effect be tried before the registrar without giving the wife any opportunity of calling witnesses. By s. 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceedings, provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

In *Redfern* v. *Redfern* (2) it was held that discovery ought not to be granted against a party to divorce proceedings when it was sought for no other purpose than to prove such party guilty of adultery.

[SWINFEN EADY L.J. referred to *Holt* v. *Holt*. (3)]

In that case there was no denial.

In *Schoolcraft* v. *Schoolcraft* (4) a wife was ordered to file an affidavit and give discovery of documents limited to her counter-charges other than that of adultery.

In *Patch* v. *Patch* (5), where there was an allegation supported by affidavits that the wife was maintaining herself by prostitution, which she denied, and the charge of prostitution was the main question in the suit, the Court refused to rescind an order for alimony pendente lite.

Wells v. *Wells* (1) was reviewed in *Dunn* v. *Dunn*. (6)

(1) (1864) 3 Sw. & Tr. 542.
(2) [1891] P. 139.
(3) (1868) L. R. 1 P. & D. 610.
(4) (1892) 65 L. T. 794.
(5) (1869) 38 L. J. (P. & M.) 27.
(6) (1888) 13 P. D. 91.

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[SWINFEN EADY L.J. Is there any technical objection on the statute 32 & 33 Vict. c. 68? The appellant has given evidence.]

No doubt that is so.

Grazebrook, for the husband. The question before the registrar was whether the appellant was being maintained by the co-respondent at the time of her petition for alimony. It is a perfectly good answer to that petition that she is being supported by some one other than the husband: *Eaton* v. *Eaton*. (1) The position here is exactly the same as in *Holt* v. *Holt*. (2)

The cases relied upon for the appellant only go to the question of the right to discovery when the only issue is adultery or no adultery. *Dunn* v. *Dunn* (3) does not affect this case. The order appealed from is right.

Barnard, *K.C.*, in reply. *Eaton* v. *Eaton* (1) does not apply. The practice before the registrar is dealt with by the Divorce Rules, 1865, r. 191. The wife may be ordered to be cross-examined as to her means.

[SWINFEN EADY L.J. referred to *Madan* v. *Madan*. (4)]

The Court will not upon an interlocutory application try the question which is in issue in the suit. It is difficult to suggest any question which could be put in the cross-examination directed which would not go to the issue of adultery. To establish such a practice as is given effect to by this order would be dangerous. Where the only issue in the suit is adultery or no adultery and the wife has denied the allegation, that issue ought not to be tried upon an interlocutory application.

KENNEDY L.J. In this case I think we must decide the question between the parties by varying the order made by Bargrave Deane J. I do not think it necessary to refer particularly to the authorities cited in order to explain my judgment. There are certain matters which are not in dispute. First I would say that the Court is always obedient to the statute which provides that questions are not to be put to parties in interlocutory proceedings involving an answer as to whether they have committed adultery; and it is also clear that the Courts have

(1) (1870) L. R. 2 P. & D. 51.
(2) L. R. 1 P. & D. 610.
(3) 13 P. D. 91.
(4) (1867) 37 L. J. (P. & M.) 10.

always been and will be careful to see that interlocutory proceedings as to alimony, discovery, or interrogatories shall not be used so as to prejudice the fair treatment of the matter in question in the action. Turning to the question of alimony, it appears to me to be also clear that this question depends upon the possession or non-possession by the wife of sufficient means of support; and it is only right that, if the husband is called upon to provide maintenance by way of alimony, it should be open to him to prove, if he can, that the wife has no need of that alimony, the quantum of which, if granted, will depend on such considerations as the income of the husband. The question whether the wife has sufficient means of support is the main issue on which the grant of alimony depends.

In the present case there was a petition and a supplemental petition. The husband alleges that it is evident on the facts that the wife has sufficient means of support and the wife denies that that is so. I think the learned judge's order is so far right in that the husband ought to be given an opportunity to adduce evidence that the wife was not in need of alimony for her support because she has support from some other source. It may be that this source is the co-respondent, but it is impossible not to accede to the argument of counsel for the respondent that the husband must have an opportunity before the registrar to show that his wife has sufficient support. From that opportunity, as the registrar's order proves, the husband had been shut out. So far, therefore, as the learned judge's order was that the husband should have leave to file evidence that his wife had means of support, I think the husband is entitled to that. I think also that he has a right to cross-examine the wife on her affidavit subject to what I will say presently.

We have been referred to r. 191 of the Divorce Rules, 1865, but I fail to understand that there is any settled practice not to allow cross-examination on the facts alleged as to means by the deponents on one side or the other. Very often, I dare say, the matter goes no further than affidavits, but, if there is ground upon which an affidavit may properly be challenged, I think that there must be a right to cross-examination if the learned judge thinks fit. At the same time I am very clearly of opinion that

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the question of means of support should not be used directly or indirectly to get in evidence upon what is the central issue in the action, namely, the question of adultery, and, therefore, while allowing the cross-examination, it must be confined to the question of means, and the leave to the husband to file evidence must be confined to that question also. I think in substance the order made below must be varied by giving leave to the husband to file evidence and also to cross-examine the wife on her affidavit, no question to be put nor affidavit used or filed which directly or indirectly goes to the issue of adultery. Subject to that, I think the husband ought to have an opportunity to ascertain the wife's means of support.

SWINFEN EADY L.J. I am of the same opinion. The appeal is from an order of Bargrave Deane J. dated October 20, 1914. It deals with two matters. It provides for the cross-examination of the wife and for the husband being given leave to file evidence. The proceedings are upon the wife's petition for alimony pendente lite. The husband objects to paying it on the short ground that the wife has sufficient means of support independently of him. It cannot be disputed that, if that be so, it would not be proper to order the husband to pay alimony pendente lite, and the authorities have gone so far as to decide in terms in *Madan* v. *Madan* (1), a case stating the practice of the Court and decided so long ago as 1867, that "if the husband can prove that his wife has sufficient means of support independent of him, even although they be derived from the co-respondent, she will not be entitled to an allotment of alimony," the principle being that maintenance should be provided by the husband for his wife, but that if she has it already, whether from the co-respondent or any one else, the husband ought not to be ordered to pay alimony.

The first point is whether the husband ought to have leave to file evidence as to his wife's means. I think he is entitled to have that leave. The other question is an independent one. I am satisfied that the real object of the husband is to dispute his liability to pay alimony and not indirectly to obtain evidence

(1) 37 L. J. (P. & M.) 10.

upon the main issue. I deal with the case on the footing that this is a bona fide application for that purpose. Counsel for the husband made that clear at an early stage of the case by acceding to the suggestion that the order should be varied so as to preclude evidence on the question of adultery. Under those circumstances I am of opinion that, the wife having denied that she has means, it is right that there should be a cross-examination so that the husband may not be ordered to pay alimony which, if it be true that she has means, he ought not to be ordered to pay. It may be of course that on the true facts of the case the wife will be proved to be entitled to alimony, but for the reasons I have stated I think this appeal fails subject to the order of Bargrave Deane J. being varied in the manner that Kennedy L.J. has indicated.

KENNEDY L.J. The order of Bargrave Deane J. will be varied so that the order allowing the filing of evidence by the husband as to the wife's means and the cross-examination of the wife on her affidavit denying means shall be made subject to a condition that no question shall be put in cross-examination and no affidavit filed or used which directly or indirectly goes to the issue of adultery.

Solicitors: *Hasties; David A. Romain.*

G. A. S.

1914
Dec. 1

In the Estate of ANNIE EMMA WATKIN.

WHITLARK *v.* WHITE and Another.

[1914 W. 994.]

Probate—Administration with Will annexed—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special circumstances*"—*Grant to Strangers.*

The Court, with the consent of all persons interested, made a grant of letters of administration, with the will of the deceased annexed, under s. 73 of the Probate Act, 1857, to persons named as executors in another testamentary document which was pronounced against and probate of which was revoked.

The plaintiff, John Howard Whitlark, claimed to be one of the residuary legatees under the last will, dated January 24, 1911, of Annie Emma Watkin, late of Abergwynant, Dolgelly, in the county of Merioneth, married woman, deceased, who died on July 31, 1913, and to have the probate, dated September 30, 1913, of an earlier will, dated September 19, 1900, revoked and the said earlier will pronounced against, and to have the said later will established.

The two persons who were made defendants were the executors named in, and who had obtained probate of, the earlier will, and they pleaded that the earlier will was not revoked; that the later document was a direction by the deceased to them, as her executors and trustees already appointed under the earlier document, as to the manner in which she desired her property to be disposed of. The defendants claimed that the Court should grant to them probate of the two documents as together constituting the last will and testament of the deceased.

Bayford, for the plaintiff, cited *In the Goods of Hale* (1); *In the Goods of Priscilla Brotherton.* (2)

Talbot-Ponsonby (*W. O. Willis* with him), for the defendants, cited *In the Goods of Charles Potter*, *Potter* v. *Potter.* (3)

(1) (1874) L. R. 3 P. & M. 207. (2) [1901] P. 139.
(3) [1899] P. 265

SIR SAMUEL EVANS, PRESIDENT. In this case the defendants were appointed executors of the will of the testatrix dated September 19, 1900, and they proceeded after her death to take probate of that will in common form.

It was subsequently ascertained that a document in the form of a holograph will dated January 24, 1911, had been signed by the testatrix as her will. This will was duly executed and attested, and it purports to dispose and does dispose of the whole of her property, but it does not appoint any executor. This will, therefore, so far as any dispositions of property are concerned, revokes the will of 1900.

I think the best course in this case, if the law permits me to do it, will be not to admit both these documents to probate. The sole object of doing so is to incorporate the appointment of executors made by the former will. The first will is a very lengthy document. No part of it is effective, except possibly the appointment of executors. The very fact of its being admitted to probate might lead to difficulties hereafter, as the dispositions are different to the dispositions under the subsequent will. And to admit it to probate would add considerably to the expenses of administration.

The more convenient course is to grant letters of administration, with the last will annexed, to the persons named as executors in the earlier will, all persons interested in the estate consenting to this course, and the executors, who are parties, also consenting.

The two cases of *In the Goods of Hale* (1) and *In the Goods of Priscilla Brotherton* (2) were cited as instances in which applications for letters of administration under s. 73 were refused. Those cases stand on their own facts, which were entirely different from the facts in the present case.

The case of *In the Goods of Charles Potter*, *Potter* v. *Potter* (3), cited on the other side, was a case where all parties interested in the estate had entered into a compromise with a view to putting an end to all further disputes. The Court upon application by a stranger made a grant under s. 73. That case also stands on

(1) L. R. 3 P. & M. 207. (2) [1901] P. 139.
(3) [1899] P. 265.

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WATKIN, IN THE ESTATE OF. WHITLARK. v. WHITE.

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its own facts, but is more like the present one than the other two cases cited.

Apart from authorities, I hold that there is power under s. 73 for this Court to adopt the most convenient course, which is to make a grant of letters of administration with the later will annexed to the persons named as executors in the earlier will.

I revoke the probate of the earlier will, and formally pronounce against that will, finding that it was revoked by the later will.

I order that the costs of all parties come out of the estate.

Solicitors for plaintiff: *White & Leonard.*

Solicitor for defendants: *Kenneth Claye.*

H. D. G.

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Nov. 23, 24; *Dec.* 7.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

(IN PRIZE.)

THE ROUMANIAN.

[1914 No. 158.]

Prize Court—Jurisdiction—Outbreak of Hostilities—Enemy Cargo on British Vessel—Vessel diverted to British Port—Seizure of Oil Cargo as Droits of Admiralty—Part Cargo discharged into Oil Tanks—Definition of "Port"—Freight—Landing and Storing Charges.

A cargo of refined petroleum oil in bulk, owned by a German company, was shipped at Port Arthur, Texas, on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain and Germany, and, at the suggestion of the Lords Commissioners of the Admiralty, her owners diverted her to a port in the United Kingdom (Dartmouth) for orders. From there they ordered her to proceed to Purfleet and there discharge the oil into the tanks of the British company owning the wharf. When the larger part of the cargo had been so discharged an officer of the Customs gave the master of the vessel notice in writing that the whole of the cargo was "placed under detention." On an application by the Crown for the condemnation of the cargo as lawful prize seized

in port, and objection taken that the tanks were "on land" and, therefore, not within the jurisdiction of the Prize Court:—

Held by the President (Sir Samuel Evans), that the tanks were, in effect, oil warehouses, and warehouses were included in the definition of a "port." The case, therefore, was within the jurisdiction of the Court, and the whole of the oil cargo was maritime prize subject to seizure as and where it was, at the time the notice was given, whether on board the ship or in the tanks; but the Crown, without admitting liability, consented to pay to the owners of the vessel such pro rata freight as the registrar and merchants should find to be reasonable, as well as the charges of the owners of the oil tanks for landing and storage.

Held, further, that the company owning the oil, being registered and having its place of business in Germany, must be treated, for prize purposes, as an enemy, although the company was in the nature of a combine, as it included, to the extent of 90 per cent. of the shares, Roumanian, Russian, and other companies neutral or allied.

THE tank steamship *Roumanian* (Robert Ross, master), of 3088 tons net register, classed 100 A1, owned by the Petroleum Steamship Company, Limited, of London, and under charter to the Deutsch Petroleum Verkaufs, &c., Company of Hamburg, left Port Arthur, Texas, before the declaration of war on August 4 between Great Britain and Germany, with a cargo of 6264 tons of refined petroleum oil in bulk, the property, at the material time, of a German company, the Europäische Petroleum Union Gesellschaft of Bremen.

The destination of the vessel was a safe port in the United Kingdom or Continent between Ostend and Hamburg inclusive, as ordered on signing bills of lading, and Hamburg was, at the time of signing the bills of lading, indicated as the port of discharge, freight being payable on arrival at the rate of 22*s.* 6*d.* per ton of 20 cwts. of oil intake quantity.

When in the English Channel, and at the suggestion of the Lords Commissioners of the Admiralty that the vessel should be diverted to a port in the United Kingdom, the master received instructions from the owners of the vessel, through Lloyd's signal station at Prawle Point, on or about August 14, to proceed to Dartmouth for orders, and the orders received were to proceed to the Thames. When the vessel arrived at Gravesend the pilot there informed the master that the instructions of the owners were to proceed to Purfleet and discharge the oil into the tanks

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at the wharf owned by the British Petroleum Company. She was accordingly, on August 21, moored there, and the usual Customs visit was made, a sample of the oil being taken away to be tested.

The discharge of the cargo into the tanks ashore, some 150 to 200 yards from the wharf, by means of connecting pipes worked by the steamer's pumps, commenced at 12.15 P.M. on the same day, and continued day and night until 4 A.M. on August 23, when all the oil was discharged, notice having in the meantime (7 P.M. August 22) been given by a letter (set out in the judgment) addressed to the master, and delivered to the chief officer on board the vessel by a messenger from a member of the Customs special war staff at Gravesend, that the whole of the cargo was "placed under detention." At that time about 4800 tons of the oil had been discharged from the vessel into the tanks, and about 1400 tons remained in the ship.

1914. Nov. 23, 24. *Sir J. A. Simon, A.-G.*, and *Theobald Mathew*, for the Crown applying for the condemnation of the whole of the cargo of the steamship *Roumanian* as lawful prize.

The points raised by the affidavits filed in this case may be grouped under five heads, namely, (1.) Was the cargo properly seized so as to bring it within the jurisdiction of this Court, involving (2.) the meaning, for purposes of jurisdiction, of the word "port"? (3.) Are the owners of the oil enemies in the sense that the oil was enemy property liable to seizure? (4.) Assuming that the cargo was rightly seized, are the owners of the ship, the Petroleum Steamship Company, entitled to claim freight, or charges in the nature of demurrage? (5.) Are the owners of the wharf, the British Petroleum Company, entitled to their charges as wharfingers?

As to (1.) and (2.), it is submitted that the cargo was properly seized in a port by a notification of detention given by one of the special war staff, acting on behalf of the Crown, at a time when the cargo was not yet released by the Customs, in their fiscal capacity, as being free of duty, this not being done until after the date of the letter giving notice of detention. It is true that, at the time the Customs indicated that they intended, on behalf

of the Crown, detaining the whole cargo, the greater part had, in fact, passed from the vessel into the oil tanks, and the suggestion is that this portion was on "land" and, therefore, outside the jurisdiction of a Prize Court; but the jurisdiction over enemy property in "port" is not limited to the area of water, that is to say, the right to seizure, and the right of this Court to condemn, are not limited by salt water, but include things which are in ports, harbours, and rivers, or, as it is put in Story's Prize Courts at p. 28, "As a preliminary to the subject it may be observed, that the ordinary prize jurisdiction of the Admiralty extends to all captures made on the sea jure belli; to captures in foreign ports and harbours; to captures made on land by naval forces, and upon surrenders to naval forces either solely or by joint operations with land forces, and this, whether the property so captured be goods, ships, or mere choses in action; to captures made in rivers, ports and harbours of the captor's own country; to money received as a ransom or commutation on a capitulation to naval forces alone, or jointly with land forces." See also on the question of jurisdiction *Le Caux* v. *Eden*, reported in a note to *Lindo* v. *Rodney*. (1) See also *The Two Friends* (2), a case of salvage and recapture, where part of the salved cargo had been landed before the suit was instituted. In that case Lord Stowell overruled the protest against the jurisdiction of the Court, and held that the part of the goods which had been landed were properly seized.

As to what may be included in the word "port" the words of Sir Matthew Hale in De Portibus Maris are material. He there says that the term port "involves something artificial" (3) (the passage is set out in the judgment of the President), and it may be fairly urged, on the above authorities, that the word "port" will cover the tanks, that is to say, the oil falls into the category of maritime merchandise of the enemy in port which could be as effectively seized in the tanks on the wharf as if the oil were in the ship's tanks, or, in other words, the oil tanks may be treated

(1) (1782) 2 Doug. at p. 614.

(2) (1799) 1 C. Rob. 271 and note; 1 Eng. P. C. 130, at p. 136.

(3) See *Foreman* v. *Free Fishers of Whitstable* (1870) L. R. 4 H. L. 266, Lord Chelmsford's judgment at p. 284.

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as oil warehouses, forming part of the port, in which a portion of the oil was stored pending the discharge of the whole cargo. It is suggested, therefore, that the cargo was properly seized in port so as to bring it under the jurisdiction of this Court, and that it should now be condemned.

As to the third head: whether the owners of the oil (the Europäische Petroleum Union of Bremen) can be treated as enemies? It is admitted that they are a German company, an incorporated entity, but it is suggested that, inasmuch as the shares are for the most part held by neutrals or allies,—for instance there is a large holding by a Roumanian company, and another holding by a Russian company,—therefore the company itself which owns the oil ought not to be regarded as an enemy; but it is submitted that this Court will not go behind the entity of the body as ascertained by the place where it is registered and carries on its business, for, if that were to be done, it would be further necessary to inquire into the composition of the Roumanian company, the Russian company, and the other companies which go to make up the German company owning the oil. This Court will, therefore, regard the German company as an enemy.

The fourth question is whether the Petroleum Steamship Company, the owners of the ship, are entitled to freight, that is, assuming that the cargo should be condemned, is the Crown to be treated as liable to the shipowners for freight?

On this point, without admitting any legal liability, but taking into consideration that, at the suggestion of the Lords Commissioners of the Admiralty, the owners of the *Roumanian*, who are a British company, diverted their vessel to this country, the Crown will consent to pay freight pro rata, the amount to be ascertained in the usual way. Charges, however, in the nature of demurrage will not be paid, as such charges would have been incurred had the vessel gone on to her destination, with the risk of the vessel being captured on the way by the enemy and the cargo released without payment of any charges whether in the nature of demurrage or otherwise.

As to the last head, and again without admitting any legal liability, the Crown will consent to pay the reasonable charges of the wharfingers, that is, the owners of the wharf and of the

tanks, the amount to be also ascertained by a reference, and it will be the duty of the Executive to see that, in neither case, the moneys so paid to the owners of the ship or to the wharfingers, as the case may be, reach the enemy.

Maurice Hill, K.C., with *R. H. Balloch*, for the owners of the vessel, and the owners of the wharf and tanks, and with *C. Robertson Dunlop*, for the owners of the cargo, and certain shareholders of the company owning the cargo.

It is submitted on behalf of the owners of the oil (the Europäische Petroleum Union) that at any rate the greater portion, some 4800 tons,—which had already, before the notice from the Customs, been discharged into oil tanks ashore—could not lawfully be seized as droits of admiralty, as it was on land and, therefore, not within the jurisdiction of a Prize Court: see *The Ooster Ems.* (1) See also *The Hoffnung* (No. 3)(2); *The Charlotte* (3); and especially *Brown* v. *the United States.* (4)

Further, with regard to the nature of the seizure, it is submitted that no seizure, in any sense, took place before the evening of August 22, when the letter addressed to the master was delivered on board the vessel at 7 P.M. and received by him at 11 P.M. This letter merely stated that the cargo was "placed under detention."

The procedure with regard to the entry of goods requires the shipowner to report to the Customs what goods he has on board. The goods are then entered, and petroleum would be entered as free, as there is no duty payable unless it comes up to a certain standard. The Customs take samples and apply tests, and if it turns out that the oil is subject to duty that duty would be recoverable; but the oil in the ship, and in the tanks ashore, was not in the custody of the Customs, and the notice served on the master was not the taking of prize as prize, for some unequivocal act, of a hostile character, must be done showing the intention to take as prize. Here there was nothing to indicate that the Custom House authorities were acting otherwise than in their fiscal capacity whilst they were engaged in ascertaining whether

(1) 1 C. Rob. 271 at p. 284, note (a); 1 Eng. P. C. 130, at p. 136.

(2) (1807) 6 C. Rob. 383, 386; 1 Eng. P. C. 583, 585.

(3) Note in 6 C. Rob., p. 386.

(4) (1814) 8 Cranch, 110.

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the oil was subject to duty, which they ultimately decided it was not, and it cannot be said that there was any taking as prize until the writ was issued and served in September, by which time the whole of the oil had been stored in the oil tanks on land out of the jurisdiction of this Court.

In Upton's Maritime Warfare and Prize (1), with reference to the Statute of Prize it is said that "to constitute a valid capture there must always be some act done manifesting the intention to seize and retain the prize."

The Prize Court does not treat as a prize, that is to say, it does not treat as a prize to the King in his right of admiralty, goods which are on land, whether they have previously formed part of a cargo afloat or not. In right of the Crown, not in the right of the office of admiralty, there may be rights and powers over enemy goods upon land; but those are not matters which the Prize Court deals with, and practically any such existing rights have been abandoned.

Prize jurisdiction is only in respect of the high seas, ports, roads and creeks, and on land in enemy country by naval and military expeditions. In Story's Prize Courts, after the passage read by the Attorney-General at p. 28 occurs the following statement: "but the Admiralty, merely by its own inherent powers, never exercises jurisdiction as to captures or seizures as prize made on shore without the co-operation of naval forces, whether made in our own or in a foreign territory. Whenever such a jurisdiction is exercised it is by virtue of powers derived aliunde"; and the case of *Lindo* v. *Rodney* (2) cited by the Attorney-General is no authority against the present contention, because the only question directly involved there was a capture by a naval force on enemy's land, and a capture by a naval force has always been a matter of prize. The case of *The Two Friends* (3) (in which *The Ooster Ems* is quoted) does not weaken this argument, nor does *The Hoffnung* (4)(in which *The Charlotte* is referred to). In *Brown* v.

(1) The Law of Nations affecting Commerce during War (1863), p. 189.

(2) 2 Doug. at p. 614.

(3) 1 C. Rob. 271, at pp. 282, 284; 1 Eng. P. C. 136.

(4) 6 C. Rob. 383, 386; 1 Eng. P. C. 583, 585.

The United States (1) the cargo was seized on land in fact, and as there was no Act of the Legislature permitting it, it was held not confiscable in America.

The Naval Prize Act, 1864 (2), under s. 34, limits the jurisdiction of the Prize Court on land to public property so as to exclude the private property of private persons, and when power was required to enable the Prize Court to deal with booty taken by military forces on land, the statute 3 & 4 Vict. c. 65 (s. 22) was passed. See the case of the *Banda and Kirwee Booty*. (3) So the forms to carry out the statutes and rules as to prize directly or indirectly relate to goods as cargo or part cargo laden on board the ship "at the time of the capture and seizure thereof," or, if the goods did not form part of the cargo of a ship, then a statement must be made of where and how taken. This no doubt refers to the case of booty taken on the enemy's land. It may be asked where is the line to be drawn if it is put that goods which have been part of a cargo ought still to be regarded as part of a cargo though they are on the shore in port? The only solution seems to be when they cease to be cargo.

In this case the petroleum tanks were 150 to 200 yards in shore. The position of such tanks is not so much for convenience of discharge from the river, because that can be attained by means of pipes, but to be conveniently situated with regard to the railway is the object sought to be obtained, and many petroleum tanks are miles from any water. The test would seem to be that suggested by Lord Thurlow, quoted with approval by Lord Stowell in *The Ostermeyer*, and referred to in *The Two Friends* (4), namely, that if the goods have passed in the way of civil bailment by delivery into civil hands they have ceased to be the subject of prize. Here they had passed into the hands of the warehouseman—the tank keeper—and in so passing they ceased to be cargo.

It is admitted that the Europäische Petroleum Company,

(1) 8 Cranch, 110; 2 Pitt Corbett at p. 252.

(2) See Tiverton's Prize Law, pp. 127, 130.

(3) (1866) L. R. 1 A. & E. 109, at p. 129.

(4) 1 C. Rob. 271, at p. 282.

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owning the oil, is a registered company with its principal seat in Germany; but it is a combine with shareholders of all nationalities, and if, strictly, the goods are deemed enemy goods, and condemned as prize, practically the enemy will not be harmed, as it will be our allies and neutrals who will suffer, for the company being a combine, its shareholders are Belgians, French, Russians, Roumanians, &c.

As the Attorney-General, on behalf of the Crown, consents to pay what is found by the registrar and merchants to be reasonable under the head of freight pro rata itineris, and also the reasonable charges, to be found by the same tribunal, for landing and storing the oil in the oil tanks, it is unnecessary, in the present case, to labour these points on behalf of the owners of the vessel and the owners of the tanks.

Mathew in reply. According to the affidavit of the officer of Customs (Mr. Craig) "the above mentioned cargo was seized as prize by my direction to the use of His Majesty in the said port," that is, the Port of London, and the important point is whether the place in question can be described as a port in the literal sense of the word. It is submitted that the word "port" has no more a technical meaning than the word "river" or "creek," and, for present purposes, means a place to which ships may come and load or unload their cargoes (1), and, according to the definitions already referred to, it is something besides, for it is all the machinery essential for the purpose of enabling ships so to load or unload their cargoes, and oil tanks are a part of the machinery of an oil port.

Cur. adv. vult.

Dec. 7. SIR SAMUEL EVANS, PRESIDENT. This cargo consisted of 6264 tons of refined petroleum oil in bulk.

It was shipped on the steamship *Roumanian* at Port Arthur, Texas. The commercial documents are in evidence. Without going into detail it is sufficient to say that the shipment took place before the outbreak of the war, and that the cargo of oil was destined for Hamburg.

At all times material for this decision the oil was the property

(1) See *The Möwe*, ante, at p. 15.

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of a German company. At all material times, therefore, the oil was the property of enemy subjects. As enemy property it is claimed by the Crown as having been seized on behalf of the Crown as lawful prize in right of the Crown to droits of admiralty.

On the other hand, the German company owners claim that it could not lawfully be so seized; and, alternatively, that a portion of the oil which had already been discharged into oil tanks on shore could not lawfully be so seized.

There are other claims by the owners of the steamship for freight and other charges and expenses; and also by the proprietors of the tanks for charges and expenses due to them as wharfingers. These latter claims have to some extent been dealt with by consent, and will be disposed of at the end of this judgment.

The main question arises upon the claim put forward by the owners of the oil.

Three limited companies come into the history of the case. I will for convenience' sake now describe them, and afterwards refer to them by shorter titles.

They are—

(1.) The Europäische Petroleum Union Gesellschaft M.B.H. of Bremen. Neutral bodies and subjects are shareholders to a considerable extent in this company. It is a corporate body duly incorporated under the laws of Germany, and as such entered an appearance in these proceedings. There was some discussion in argument as to its constitution, but it was not really denied that it was a German company. It clearly is. This company I shall hereafter refer to as "the German company." They were the owners of the cargo of oil.

(2.) The Petroleum Steamship Company, Limited. This company was an English company incorporated under the Companies Acts, 1908 and 1913. The vast majority of the shares were owned by the German company, but there were also English shareholders and English directors, and its business was carried on in this country. This company I shall hereafter refer to as "the steamship company." They were the owners of the steamship *Roumanian*.

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(3.) The British Petroleum Company, Limited. The same remarks apply. This was also an English company, and is hereafter referred to as "the tank company." They were wharfingers, and the owners of the tanks into which some of the oil had been discharged.

The material facts are substantially undisputed. I will state them shortly. While the *Roumanian* was on her voyage on the high seas, the secretary of Lloyd's wrote to the managers for the steamship company that the Lords Commissioners of the Admiralty had suggested that, in the national interest, the *Roumanian*, which, according to Lloyd's records, was then on passage to Hamburg, should be diverted to a United Kingdom port. When the vessel had reached the English Channel, her master (Mr. Ross) on or about August 14 received instructions from her owners through Lloyd's signal station at Prawle Point to proceed to Dartmouth for orders. The vessel was accordingly put into Dartmouth, arriving there apparently on August 14. There she remained until August 20, when her owners ordered her to proceed to London. She arrived at Purfleet on August 21, and was moored at the tank company's wharf at noon of that day. The discharge of the oil into the tanks of the tank company by means of pumps and connecting pipes was immediately begun. Information has in such cases to be given, and was in this case given by the shipbrokers to the Custom House officer of the arrival of the steamship, in order that the oil may be tested for the purpose of ascertaining whether the particular oil is subject to duty or not. The Custom House officer does not release oil cargo until he has tested it and ascertained whether duty is payable on it or not. The officer visited the steamer at Purfleet on August 21 about 4 o'clock P.M. Some of the oil had already been discharged. He tested a sample taken from one of the ship's tanks with the specific gravity instrument. It was somewhere near the dutiable line; so he took away a sample to be tested in the laboratory of the Custom House. He again went to the vessel at 3.30 o'clock P.M. on the next day (August 22), and took another sample, this time from the discharging pipe. He did not receive the test note from the Custom House analyst until August 24.

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Meantime, on August 22 (about 7 o'clock P.M.), a letter was delivered on board the steamer from the Custom House officer at Gravesend, of which the following is a copy :—

"To the master, S.S. *Roumanian*, Purfleet.

"Custom House, Gravesend,
22.8.14.

"Sir,—I have to inform you that your cargo consisting of about 6264 tons of refined petroleum oil is placed under detention.

"Your obedient servant,
"H. Burrell, Senr."

This was the seizure, by one of the special war staff of the Customs on behalf of the Crown, of the cargo as prize. At this time, in round figures, 4800 tons had been discharged from the vessel into the tanks, and 1400 tons still remained in the vessel. To complete the story, the test note afterwards given on August 24 showed that the oil was of a quality admitted free of duty. The Customs officer first referred to deposed that until the cargo is certified free of duty it is still regarded as being in the charge of the Customs, and an offence against the revenue laws would have been committed if any delivery had taken place before.

As to the quantity of 1400 tons which remained in the ship, it is quite clear that, by international law, it was confiscable as prize on board a ship which arrived in port after the outbreak of hostilities. In the claim the German owners invoke the Hague Convention No. 6. But the Hague Convention is not applicable at all in this case. If the case is regarded as analogous to that of an enemy cargo on board an enemy ship under arts. 3 and 4 of the Convention, in any event German subjects could not found any claim under those articles because Germany declined to agree to them and is not a party to them.

But the main and important question contested between the Crown and the claimants was whether the 4800 tons already discharged, and in the tanks of the tank company, were confiscable as prize and droits of admiralty.

The broad foundation of the argument for the German

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company was that this oil was on land, and that enemy property on land cannot be seized as prize. The tanks were contiguous to the tank company's wharf, where the ship was moored, and were used in conjunction with the wharf for dealing with oil cargoes. Their distance from the wharf was between 100 and 150 yards.

This important question may be approached from two aspects. In the first place, was the oil in the tanks on land as this phrase has been used in international law; or was it still in port for the purpose of applying the principles of seizure of enemy property in port? Secondly, even if in strictness it was on land, was it in the circumstances of this case immune from seizure and free from confiscation in a Court of Prize? Before dealing particularly with these two questions, it would be helpful to look at the whole subject more generally.

According to the practice of former times, and according to the views held by some of the most revered and authoritative international jurists, all enemy property on land as well as on sea and in ports, creeks, and rivers could be captured and confiscated. But from time to time, by special treaties, and subsequently by the mitigation of rules considered to operate harshly on enemy owners of private properties, capture of such properties on land has been avoided and has fallen into desuetude.

The present position is well stated by Hall in his work on International Law (at p. 435 of the sixth edition):—

"Upon the whole, although subject to the qualification made with reference to territorial waters" (i.e., excepting property entering territorial waters after the commencement of war, see p. 431), "the seizure by a belligerent of property within his jurisdiction would be entirely opposed to the drift of modern opinion and practice, the contrary usage, so far as personal property is concerned, was until lately too partial in its application, and has covered a larger field for too short a time to enable appropriation to be forbidden on the ground of custom as a matter of strict law; and as it is sanctioned by the general legal rule, a special rule of immunity can be established by custom alone. For the present, therefore, it cannot be said that a belligerent does a distinctly illegal act in confiscating such

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personal property of his enemies existing within his jurisdiction as is not secured upon the public faith; but the absence of any instance of confiscation in the more recent European wars, no less than the common interests of all nations and present feeling, warrant a confident hope that the dying right will never again be put in force, and that it will soon be wholly extinguished by disuse."

It ought, however, to be borne in mind—what, indeed, is often forgotten—that a potent factor, and a beneficent object, in the mitigation of the severity of seizure on land was the desirability of saving from confiscation the property of citizens of an enemy State which was already in the belligerent country at the outbreak of war. A beginning was made by exempting moneys lent by individuals of an enemy State to a belligerent State. Then real and immovable property was made an exception, at first from absolute confiscation, and later from sequestration of its income. Then came treaties allowing time for the withdrawal of mercantile property from a belligerent country at the outbreak of war.

Hall, in the work already referred to, speaks of this advance and the reasons for it as follows:—

"The custom which has become general of allowing the subjects of a hostile State to reside within the territory of a belligerent during good behaviour brings with it as a necessary consequence the security of their property within the jurisdiction, *other than that coming into territorial waters*, and indirectly therefore it has done much to foster a usage of non-confiscation; but, as it is not itself strictly obligatory, it cannot confer an obligatory force, and the treaties which contain stipulations in the matter, though numerous, are far from binding all civilised countries even to allow time for the withdrawal of mercantile property."

I have before had occasion to refer to a note by Dana in his edition of Wheaton (8th ed., 1866). It not only deals admirably with the distinction between seizure on land and capture at sea, but it also gives prominence to the reasons why "maritime merchandise" and "cargoes" should be differently regarded, without (I think) making a qualification that the "merchandise" or "cargoes" must be actually afloat at the time of the seizure. However this may be, I make no apology for citing the passage,

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as containing considerations worthy of being noted in connection with the present case:—

"*Distinction between Enemy's Property at Sea and on Land.*

"War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilisation has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property—from things almost sacred, to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But, on the high seas, these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent is res omnium, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

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"The matter may, then, be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for the purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character, and some not. There are very serious objections, of a moral and economical nature, to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea, these objections apply with so little force that the prima facie right of capture remains." (1)

We start accordingly in considering the present case with the broad proposition that all enemy property—ships and cargoes—may, after the outbreak of war, be captured jure belli on the sea, or in rivers, ports, and harbours of this country. (There are other captures which can be made which do not concern this case.) All such captures are tried in the Prize Court, and can only be condemned in this Court. In days gone by constant contests and quarrels were waged between the Common Law Courts and the Court of Admiralty as to the jurisdiction claimed by the latter to deal with causes civil and marine in ports, harbours, rivers, or creeks within the body of a county which the Common Law Courts asserted could only be tried at law. But the jurisdiction and exclusive jurisdiction of the Court of Admiralty in prize was never doubted. "The nature of the ground of the action—prize or not prize—not only authorises the Prize Court, but excludes the common law." (Lord Mansfield in *Lindo* v. *Rodney* (2).) These functions of the Prize Court have now been allotted to this Division of the High Court; and contests between the various Divisions would not now occur. It was considered, however, that the Judicature Acts did not render unnecessary the Commission which had been issued by the Crown at the beginning of each war; and accordingly a Commission was issued at the beginning of this war in, I think, the same operative terms as the old Commissions. By this Commission the Court is

(1) Dana's Wheaton, note 171 on p. 451. (2) (1782) 2 Doug. 614a.

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"authorised and required to take cognisance of and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships, vessels and goods that are or shall be taken, and to hear and determine the same; and according to the course of admiralty and the law of nations, and the statutes, rules and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels and goods as shall belong to the German Empire or the citizens or subjects thereof, or to any other persons inhabiting within any of the countries territories or dominions of the said German Empire, which shall be brought before you for trial and condemnation." (A separate Commission was issued in reference to Austria-Hungary.) As Lord Mansfield said in *Lindo* v. *Rodney* (1), "the Commission don't say—upon the sea. It don't say—goods in the ship. 'Reprisals,' is the most general word that can be used," and he proceeded, "In causes civil and marine, to give jurisdiction to the Court of Admiralty" (by which he meant the ordinary jurisdiction of the Court) "the libel must allege the cause of suit to be done upon the high sea, and therefore, if that had been the intention of the Commission, or the rule of law," (i.e., in relation to the jurisdiction in prize) "it would certainly have been so expressed in the Commission."

Now in this case, the steamship *Roumanian*, from the moment of the outbreak of war, carried an enemy cargo. This cargo as such was subject to capture or seizure as prize, either on the high seas, or after the arrival of the vessel in port. The vessel was not bound to come into a port of this country. But she was in a dilemma. Her cargo was destined for and consigned to the port of Hamburg by the joint operation of the charterparty and the bill of lading. To deliver the cargo at Hamburg was forbidden; that would be trading and having intercourse with the enemy. To remain at sea was not practicable. If she proceeded to any other country's port, or indeed wherever she proceeded at sea, she was liable to be captured by a German cruiser—if that had happened, she might have been taken to Hamburg, and the German company might have secured their cargo; and the enemy State might capture the vessel herself into the bargain.

(1) 2 Doug. 614a.

Of course, those responsible for the vessel were quite right in diverting her into a port of this country.

Now, examine the consequences relating to the cargo and its owners. As the vessel came, and properly came, into a British port, she could not help bringing the oil laden in her into the port too, unless she previously pumped it into the sea. She was not bound to do that. Apart from the labour and waste of it, she might have looked forward in hope to securing her freight out of the cargo.

But, if I may personify the cargo for a moment, I would ask what right of entry had it into this country? What right had it to expect protection in this country at some one's care and expense, for the sake of its owners? Its owners could not have ordered its delivery to any one here on their behalf; no one could have accepted its delivery for them, as that would be against the law. It may be that the shipowners could have exercised their lien for freight by selling it, or part of it, if it had not been seized, but they did not purport to do so. It was delivered—no, that is an ambiguous term—4800 tons of it were pumped into the tanks; and there they were, subject to some kind of tacit understanding as to the lien for freight—a sort of nullius bona. The oil came into the port as maritime merchandise of the enemy subject to seizure, and, in my opinion, the whole of it remained such until it was actually formally seized on behalf of the Crown on August 22. I cannot see how or by what process the portion of it which was at one end of the pipe in the tanks on shore had ceased to be seizable enemy cargo any more than the portion remaining in the ship at the other end had. In my opinion, the view that one part was seized in port, and the other on land and not in port, would be pedantic and erroneous.

But in deference to the arguments upon the points raised, I must deal with them, and with the cases cited, to which a few other cases will be added.

It was strenuously argued, as to the 4800 tons, that the seizure was on land as distinguished from in port; and, therefore, that this Court had no jurisdiction over it as prize.

The word "port" may bear different meanings in different

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connections. In relation to enemy goods—by their nature the subject of naval prize when at sea after the commencement of the war—I think the word "port" has a meaning extended beyond the part covered with water in which a ship carrying the goods would be afloat. Indeed, counsel for the German owners conceded that a wharf alongside would come within the "port" in this sense, although it would be strictly "on land." I fail to see what difference the 100 yards from the edge of the wharf ought to make.

Sir Matthew Hale, in his De Portibus Maris, describes "ports" and "creeks" as follows: "A port is an haven, and somewhat more.

"1st. It is a place for arriving and unlading of ships or vessels.

"2nd. It hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn.

"3rd. It hath a ville or city or borough, that is the caput portus, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. So that a port is quid aggregatum, consisting of somewhat that is natural, viz., an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys and wharfs and cranes and warehouses and houses of common receipt; and something that is civil, viz., privileges and franchises, viz.: jus applicandi, jus mercati, and divers other additaments given to it by civil authority. . . . .

"A creek is of two kinds, viz., creeks of the sea, and creeks of ports.

"The former sort are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz., creeks of ports, are by a kind of civil denomination such. They are such, that though possibly for their extent and situation they might be ports, yet they are either members of, or dependent upon other ports. And it began thus. The King could not conveniently have a customer and comptroller in every port or haven. But these custom-officers were fixed at

some eminent port; and the smaller adjacent ports became by that means creeks, or appendants of that where these custom-officers were placed." (Hargrave's Law Tracts, pp. 46, 47, 48.) It will be observed that "warehouses" are expressly included in the definition of port, and the tank company's tanks in the present case could not be placed in a category higher than, or different from, warehouses. The tanks are oil warehouses.

The Ooster Ems and *The Two Friends* (1) were referred to. The facts in these cases were quite different. Of *The Ooster Ems* Lord Stowell said in *The Two Friends* (1) "that the goods had never been taken on the high seas; they had only passed in the way of civil bailment on delivery into civil hands, and were afterwards arrested on shore as prize." And in *The Two Friends* (1) Lord Stowell would not accede to the argument that the goods, being on shore, were out of the jurisdiction of the Court of Admiralty in prize. The concluding paragraph of his judgment is:

"But the present case is radically bottomed in prize; and, if so, all the consequences of prize will follow. If the goods are removed before proceedings are commenced, they are still liable to be called in by a monition. A different way has been taken in this case by a personal monition, as more convenient to the parties proceeded against. On the whole, I am of opinion that the English seamen are entitled to redress here; that these goods being matter of prize, even that part which had been landed, are subject to the jurisdiction of this Court, and I shall, therefore, overrule the protest."

That was a case of salvage on recapture when part of the salved cargo had been landed before the suit was instituted. Nothing in these cases, in my opinion, precludes the claim of the Crown in the present case.

Counsel for the German company also cited *The Hoffnung* (No. 3) (2) and *The Charlotte*. (3) The former was a case where, before seizure at the outbreak of hostilities, a part of the cargo had already been sold, and had been applied to the reparation of the

(1) 1 C. Rob. 271 and 283, 284, note (*a*); 1 Eng. P. C. 130, at p. 136.

(2) 6 C. Rob. 383, 386; 1 Eng. P. C. 583, 585.

(3) Note to above case in 6 C. Rob. pp. 385, 386.

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vessel also before the seizure. The decision was that the captors could not claim average against the ship on account of the cargo so sold and applied. In the latter case the Court held that the proceeds of the part of the cargo already sold and delivered before it was even subject to seizure were not amenable to the jurisdiction of the Prize Court. It does not seem to me that either of these decisions can assist the claim of the German owners in the present case.

The other authority referred to was the well-known case of *Brown* v. *The United States*. (1) In the District Court it was tried before Story J., and is there reported as "the cargo of the ship *Emulous*." (2) Story J. also sat in the Supreme Court on the appeal, and was one of the dissenting judges. It is an interesting and illuminating case. The subject-matter was some timber which had been British property carried on an American ship, and which had been landed and put into a salt-water creek (which was not navigable, although the tide ebbed and flowed there), some twelve months before the seizure. About five months after it was landed it had been sold to the claimant Brown. It was in that position at the commencement of hostilities between the United States and Great Britain, and was seized afterwards. The ultimate and actual decision was that the property was on land, and was found on land at the commencement of hostilities, and that, therefore, it could not be condemned as enemy property without a legislative Act of Congress authorizing its confiscation. Of course the decision is not binding in this Court. It would be open to this Court, if it deemed fit, to accept the guidance of the judgment of Story J., who was so great an authority on prize law, even in preference to that of the very eminent Chief Justice.

But I refrain from attempting to weigh the judgments. I only desire to emphasize the fact that the ground of the decision was that the property was not only found, in fact, to be seized on land, but especially that it was found within the territory of the belligerent at the commencement of hostilities; and, further, to call attention to what Story J. conceived to be conceded by the Supreme Court if the property in question had been brought to

(1) 8 Cranch, 110. (2) (1813) 1 Gallison, 563.

where it was after war had broken out. At p. 151 (8 Cranch) this learned judge said: "The opinion of my brethren seems to admit that the fact of hostilities is to confer all the rights which war confers; and it seems tacitly to concede that, by virtue of the declaration of war, the Executive would have a right to seize enemies' property which should actually come within our territory during the war." At p. 154 he said that he understood the opinion of the Court to proceed upon the tacit acknowledgment that the Executive might seize and confiscate property (and I think he intended to include the property in question) if it had come into the country since the war.

I have now dealt with the cases which were cited. There are a few others to which I think it well to call attention. One, called 1253 bags of rice and 103 casks of rice (1), arising in the course of the American Civil War, was heard in prize in the District Court of New York. As I have just been dealing with the case of *Brown* v. *The United States* (2), I will first take from the judgment of Betts J. a passage to show what he considered to be the effect of that decision: "The decision upon the merits in *Brown* v. *The United States* (2) went upon the principle that the enemy property there seized was landed in this country before the war commenced between England and the United States, and that it was not liable to capture as prize in the absence of positive law authorising its seizure. The majority of the Court who adopted that doctrine did not controvert the decision of the Circuit Court, declaring the suit to be of a prize character, nor the historical and juridical fact that the practice of the United States Courts is governed by the rules of admiralty law disclosed in the English reports. It is very clear that in England the prize jurisdiction does not depend upon locality, but upon the subject-matter."

The part of the case before Betts J. which, though not strictly relevant, may help to throw some light upon the case now before me is that which dealt with the "103 casks of rice." That cargo was not water-borne when seized, but was found stored in a warehouse in the enemy country, and captured there by launches of a United States vessel. The question specially presented was whether the seizure on land was in law a maritime

(1) Blatchford's Prize Cases, 1861-1865, p. 211. (2) 8 Cranch, 110.

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capture. It was held in that case, dependent no doubt upon its particular facts, that it was.

Another case is *The Thalia* (1) in the Supreme Court of Prize in Japan. There a vessel belonging to Russian citizens was in itself a sort of cargo, because it had been laden upon another vessel, and so conveyed to a place near a dry dock in Japan to undergo repairs. It was placed on dry land near the repairing dock, and was there before the outbreak of hostilities. It was held to be, by reason of its character, a maritime prize, and subject to capture and confiscation.

I now finally desire to refer to some cases in this country, which are not reported. They are noted in a most valuable and elaborate report in MS. which was drawn up by Mr. Rothery, a former registrar of the Court of Admiralty during the Crimean War, and presented to one of our public departments in 1857. It represents two or three years' labour, and shows scrupulous care, and great skill and learning. Its chief object was to ascertain how and to what extent captors had been rewarded for prizes taken. I could wish it were accessible in print to those interested in these subjects, and that is also the opinion of Mr. Roscoe, the registrar, through whose kindness I have become acquainted with it. In perusing it, I have come across the following cases of interest bearing upon the question now before the Court.

One related to a seizure effected at Ramsgate. The following is the extract from the MS. report. "It is that of the French vessel *Marie Anne* (Warrant No. 97). It appears from the King's Proctor's report in this case bearing date February 26, 1805 (Treasury No. 1028), that on the breaking out of hostilities with France on May 16, 1803, John Friend of Ramsgate, in the county of Kent, shipbuilder, having obtained information that a ship called the *Marie Anne* (then under repair in his own yard at Ramsgate) and certain parts of the cargo thereof, which had been landed and deposited in warehouses, were French property, seized the said ship and goods, as being the property of His Majesty's enemies, and with great difficulty obtained the papers and documents belonging to the ship and cargo from the

(1) Russian and Japanese Prize Cases (1904-1905), vol. 2, p. 116.

merchants, in whose hands the same had been deposited, and took the master and other necessary witnesses to Deal, and caused them to undergo their examinations before the proper commissioners there, in order that the said ship and goods might be legally brought to adjudication. The result of these proceedings was that the ship and cargo were condemned as droits of admiralty, and after payment of all expenses realised the sum of 2667*l.* 1*s.* 8*d.* Upon an application being subsequently made for a grant the King's Proctor reported that the grant of 400*l.* would be a liberal reward to Mr. John Friend for his services. Accordingly a grant to that extent was made, thus giving the seizer somewhat less than one-sixth of the proceeds."

This is a case directly in point, as the cargo seized had been landed and deposited in warehouses.

The next case is that of *The Berlin Johannes* (Warrant No. 77). The extract is as follows: "It appears from the warrant in this case that the Marshal of the Admiralty had received information that the *Berlin Johannes* then lying in the river Thames, which had arrived from Rotterdam with a cargo of Geneva, was enemy's property. He accordingly seized her, but at that time the greater part of the cargo had been discharged. Proceedings were commenced in the Court of Admiralty, when it transpired that the ship had formerly belonged to British subjects, and was accordingly restored to them on payment to the Marshal of one-sixth part of the value, that being the usual proportion paid to non-commissioned persons in case of re-capture. The cargo, however, proved to be enemy's property, and was accordingly condemned as droits of admiralty, and, on being sold, realised the sum of 504*l.* 9*s.* 7*d.* This warrant grants to the Marshal one-sixth of the proceeds 'as an encouragement for his vigilance and attention.'"

I have tried, but not yet succeeded, to obtain the original papers in this case, in order to see whether the part of the cargo which had been discharged was condemned. I see no reason to doubt that it was; because, if any distinction was made between the part discharged and the part not discharged, that would almost certainly have been mentioned in the report.

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The next case is that of *The Venus* (Warrants Nos. 220 and 221). The extract from the report is as follows: "It appears from the warrants in this case that William Davies, the master of the British vessel *Venus*, whilst bound on a voyage to Hamburgh with a cargo, which he had taken on board at Genoa and other ports, received information that war had broken out between France and England, and he accordingly put into the port of Plymouth, not only for the safety of his own vessel, but also to ascertain the nature of the cargo which he had on board, and which he believed to be French. He accordingly communicated his suspicions to George Eastlake, the receiver of admiralty droits at Plymouth, who ordered the same to be seized. The result was that the ship and a considerable part of the cargo were restored, but the remainder of the cargo proving to be enemy's property was condemned as droits of admiralty, and realised the sum of 531*l.* 18*s.* 8*d.* after payment of all expenses. On an application the Crown granted 50 guineas as a reward to the master of the *Venus* in consideration of his conduct in the matter, and 100 guineas to Mr. Eastlake in consideration of his having seized the ship and cargo at his own risk. The two grants together were between a third and a fourth of the net proceeds."

I have set out this case because in the action of the master in bringing his vessel into a British port there is a close resemblance to the course of events resulting in the steamship *Roumanian* being diverted to Dartmouth and Purfleet; and also because it shows that enemy cargoes in British vessels were condemned. Counsel for the claimants intimated that he would have argued that in such a case the goods were not confiscable but for the fact that I have in previous cases in this Court decided the contrary.

There is one other matter to which I wish to refer before stating my conclusions. It may be suggested that even if the oil in the tanks were confiscable as enemy property on land, it is not the subject of prize within the jurisdiction of the Prize Court. While I think it is, I cannot see what advantage would accrue to the German company, especially in these days when all the Divisions are parts of one High Court, if the questions arising were admitted (if they could be admitted) to be decided in a

common law or other Court in this country. To adopt a metaphor employed by Lord Stowell, that would be but to make a change of postures on an uneasy bed.

Applying what appear to me to be the principles of the law of nations to the facts of the present case, I have after full consideration come to the conclusion that the whole of the oil cargo of the *Roumanian* was maritime prize, subject to seizure as and where it was, both on board and in the tanks; that the case falls within the jurisdiction of this Court; that the portion in the tanks was seizable even if it has to be regarded strictly as being on land as distinguished from the port; but also that the tanks were within the port; and that all the oil was seized, and lawfully seized, by the Customs officers on behalf of the Crown, and must be condemned to the Crown as prize in the Crown's rights to droits of admiralty.

I decide, therefore, against the claim of the German company, and decree condemnation of the whole cargo.

There remain the money claims of the shipping company and of the tank company. The legal liability of the captors for freight is not to be decided in this case, but Mr. Attorney-General, for the Crown, without admitting liability, assented to the payment of what is determined to be reasonable.

(1.) As to the claim for freight, by consent the Crown will pay what is decided by the registrar and merchants to be the reasonable amount to be determined on the principle of pro rata itineris. The question of amount is accordingly referred to the registrar and merchants.

(2.) As to the charges for landing and storing in the tanks, the Crown also assents to payment either to the shipping company or to the tank company (whichever may be entitled) of the proper sums to be ascertained also by reference to the registrar and merchants.

(3.) The claims for demurrage at Dartmouth and for coal consumed are disallowed.

(4.) The Port of London dues are to be paid by the Crown.

(5.) The claim for inspecting cargo is assented to by the Crown, and is allowed.

(6.) The claim for interest is disallowed.

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(7.) The claims for insurance stand over. Liberty to the claimants to apply in respect of them.

As to the suggestion made by the Attorney-General that the amount of the claims which are allowed should not be paid over till further order, I see no reason why the amounts, when ascertained, should not be at once paid to the claimants, upon the understanding, or upon a guaranteed undertaking, if applied for by the Crown, that no part of the money should be handed over to enemy subjects. Liberty to the Crown to apply as to this and leave (if necessary) to the claimants to appeal; but, in the meantime, the Crown not to be restrained from selling the cargo whenever it is thought proper and desirable to do so.

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for claimants: *Ince, Colt, Ince & Roscoe.*

T. L. M.

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Dec. 7, 14, 17, 21.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION.

ADMIRALTY.

[IN PRIZE.]

THE ODESSA.

[1914 No. 103.]

THE CAPE CORSO.

[1914 No. 155.]

Prize Court—Cargo—Enemy Property—Claim by Pledgees.

The Prize Court does not recognize the claim of a pledgee of cargo captured at sea, the legal property in which was at the time of capture in an enemy subject.

THE ODESSA.

CLAIM by Schröder & Co., bankers, of London, to the cargo of the *Odessa*, a German barque, G. Gabler, master, which vessel had been captured at sea by H.M.S. *Caronia* on August 19, 1914, and was subsequently condemned as lawful prize.

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The following statement of the facts is taken from the judgment of the President :—

"The subject-matter of the claim in the first case is a large quantity (51,043 bags) of nitrate of soda laden on board the German vessel *Odessa*, which I have condemned. The cargo was captured in the vessel at sea on August 19 last.

"The claimants are J. Henry Schröder & Co., of Leadenhall Street, London, a firm of which Baron von Schröder, a naturalized subject of this kingdom, and Frank C. Tiarks, a British subject, are the partners.

"The cargo was purchased from Weber & Co. (a firm of Chilean merchants) at Valparaiso by the Rhederei-Aktien-Gesellschaft von 1896, a German company carrying on business at Hamburg.

"By a business arrangement between this German company and Schröder & Co., the latter accepted bills of exchange in favour of the sellers against the cargo, and received bills of lading as security for the acceptances and the moneys payable under them. The bill of lading in this instance was dated May 8, 1914, and was made out in favour of J. Henry Schröder & Co., London, or their assigns. The vessel was stated therein to be 'bound for Channel for orders.'

"Fifteen bills of exchange for various amounts were accepted by Schröder & Co. on June 4, 1914, and twenty-one others on June 9. The due dates of these sets of bills were September 5 and 10, 1914, respectively; but the time of payment having been extended by proclamation, the actual dates for payment were October 19 and 24. Therefore when Schröder & Co.'s claim was made the bills had not been met. They have since been paid, and the total sum amounts to 41,153*l.*

"The claimants claim the cargo 'as being the property of British subjects, and/or as holders for full value of the bills of lading therefor,' and 'as the persons beneficially interested in the cargo.'"

1914. Dec. 7, 14. *Maurice Hill, K.C.* (*Sir J. A. Simon, A.-G.*, and *T. Mathew* with him), for the Crown. In order to determine whether the cargo of the *Odessa* is liable to be condemned, it is necessary to ascertain in whom was the property in the

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goods at the time of the capture: *The Miramichi.* (1) The facts show that the property in the goods passed from the seller to the buyers, the German company, as soon as the seller received from the claimants their acceptances of the seller's drafts, and that the position of the claimants was merely that of pledgees: *Sewell* v. *Burdick.* (2) Therefore at the time of the capture of the vessel the cargo was enemy's property. The fact that in the bills of lading the claimants were named as the consignees is immaterial, for, as Lord Bramwell pointed out in *Sewell* v. *Burdick* (3), the property in goods does not pass by the indorsement of the bill of lading, but by the contract in pursuance of which the indorsement was made. See also *The Abo* (4) and *The Packet de Bilbao.* (5) A pledgee of enemy's goods has, in the event of their being captured, no right to them as against the Crown. The Prize Court only considers the legal ownership of captured property, and does not recognize the claim of a pledgee or a mortgagee, or the holders of a lien, whether the property be ship or cargo: *The Ida* (6); *The Marie Glaeser.* (7) [*Shepherd* v. *Harrison* (8) and *Mirabita* v. *Imperial Ottoman Bank* (9) were also referred to.]

MacKinnon, K.C., and *C. R. Dunlop*, for the claimants. The question involved in this case is one of the utmost importance to the commercial community of this country, for practically the whole ocean trade of the world is now transacted by means of bankers' bills drawn on London. It cannot be denied that there are decisions in the books which prima facie would justify the condemnation of this cargo, but in the Prize Court precedents and authorities are less binding than in the ordinary Courts, and necessarily so, because the principles to be applied must be modified or developed as international practice and the methods and usages of trade undergo modification and development. For example, a person who has the right of stoppage in transitu has

(1) Nov. 23, 1914.
(2) (1884) 10 App. Cas. 74.
(3) 10 App. Cas. at p. 105.
(4) (1854) Spinks, 42; 2 Eng. P. C. 285.
(5) (1799) 2 C. Rob. 133; 1 Eng. P. C. 209.
(6) (1854) Spinks, 26; 2 Eng. P. C. 268.
(7) [1914] P. 218.
(8) (1871) L. R. 4 Q. B. 493; 5 H. L. 116.
(9) (1878) 3 Ex. D. 164.

the right under the Declaration of London to have the cargo released, and that right has in consequence been recognized by this Court. Further, at the date when *The Ida* (1) was decided, the suggestion that the law of the Prize Court as to ownership or property was the same as the common law was scouted, for in that case Dr. Lushington said (2): "If you can establish that the common law and the law of the Prize Court as to property and ownership are identical, you will prove wonders"; whereas in *The Miramichi* (3) it was held that the law applicable in the Prize Court to questions of ownership was the ordinary law applicable in times of peace. Therefore the present case cannot be treated as being conclusively settled in favour of the Crown by reason of the decision in *The Ida* (1), which was decided at a time when the methods of business were entirely different from those of the present day. Another consideration which must not be left out of sight is that this Court has always shown a more favourable leaning towards the claims of British subjects than to those of neutrals: *The Belvidere.* (4)

It may be conceded that the decision of the House of Lords in *Sewell* v. *Burdick* (5) shows that the claimants were pledgees of this cargo, though the view of Lord Esher as expressed in *Sewell* v. *Burdick* (6) in the Court of Appeal, and also in *Glyn* v. *East and West India Dock Co.* (7), had previously been to the contrary effect. There is, however, a distinction between this case and *Sewell* v. *Burdick* (5) in that the claimants are the consignees named in the bill of lading, and, therefore, as against the shipowner they would have been entitled on the arrival of the ship and on presentation of the bills of lading to possession of the goods. They could also have maintained conversion or trover against a third person who took possession of the goods: *Bristol and West of England Bank Co.* v. *Midland Ry. Co.* (8); *The Winkfield.* (9) The claimants have also paid the full value of the goods, and therefore no question of taking an account between them and the buyers can arise.

(1) Spinks, 26; 2 Eng. P. C. 268.
(2) Spinks, at p. 29.
(3) Nov. 23, 1914.
(4) (1813) 1 Dods. 353; 2 Eng. P. C. 183.
(5) 10 App. Cas. 74.
(6) (1884) 13 Q. B. D. 159.
(7) (1880) 6 Q. B. D. 475.
(8) [1891] 2 Q. B. 653.
(9) [1902] P. 42.

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The chief objection to the recognition by this Court of liens or charges or claims of pledgees has been the practical difficulty that the Court has not the necessary machinery for ascertaining the facts and the exact position of the parties, and there is, therefore, a danger that the Court may be misled by the existence of some secret arrangements: *The Marie Glaeser* (1); *The Tobago.* (2) The position here is exactly the reverse, for on the face of the bills of lading the name of the claimants appears as the owners of the goods, and it is only by inquiring into the facts and applying to those facts a somewhat difficult branch of the law that it becomes apparent that the claimants' position is that of pledgees. There is also a distinction between the ownership of a ship and of a cargo. It was held in *The Marie Glaeser* (1) that in the case of a ship the ship's register is conclusive as to ownership, and that you cannot go behind the register to inquire whether there is a mortgage, but in the case of cargo there is no analogous document of title, and there must always be some inquiry in order to find out who is the real owner of the cargo. Decisions as to ships cannot, therefore, be regarded as applicable to cases of the seizure of cargoes. Again, a distinction has always been made in the case of the lien for freight; the captor's right is subject to that lien: *The Tobago.* (2) The whole purpose of the capture of property at sea in war time is to destroy the property of the enemy. That object will not be achieved in this case, because the loss will fall on the claimants, at any rate until the conclusion of the war. The interest of a pledgee, who is not an enemy, ought to be protected and not confiscated, and a fortiori if the pledgee is a subject of the State which makes the capture. With regard to the American authorities the case of *The Carlos F. Roses* (3) is most in point. The facts there were similar to those of this case, with this important difference, that the claimants were neutrals and not American citizens. The decision in *The Amy Warwick* (4) supports the claimants' contention.

The principle to be derived from the authorities, both English

(1) [1914] P. 218.
(2) (1804) 5 C. Rob. 218; 1 Eng. P. C. 456.
(3) (1900) 177 U. S. 655.
(4) (1862) 2 Sprague, 150.

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and American, is that the Prize Court will not give effect to the claim of a creditor who has only a jus in rem and not a jus in re. Where claimants have asserted liens, they have failed if the lien does not give them any proprietary or possessory interest in the ship, but merely a right of action against the ship if the ship continues in existence. That was the ground of the decisions in *The Tobago* (1), *The Rossia* (2), *The Nigretia* (3), and *The Hampton* (4), and one of the grounds of the decision in *The Marie Glaeser*. (5) But it appears from the judgment in *The Tobago* (1), and also from *The Frances* (6), that where, as in this case, the claimant has a jus in re, he has that kind of property in the goods which the Prize Court ought to, and does, give effect to.

[THE PRESIDENT. What is to be done if the advance of the pledgee is not as here of the whole value of the goods, but only of a portion, say 49 per cent.?]

The goods ought to be condemned subject to the lien or charge being satisfied out of the proceeds.

Sir J. A. Simon, A.-G., in reply. It is admitted by the claimants that the goods are enemy's goods, and that the claimants are only pledgees. That being so, the facts are identical with those in *The Ida* (7), and this case can only be decided in favour of the claimants by differing from *The Ida*. (7) The claimants' contention is contrary to the principle and reasoning on which *The Miramichi* (8) and *The Marie Glaeser* (5) were decided. The interests of the holder of a bottomry bond are of a higher quality than and take precedence of the interest of a pledgee. It could not be contended that those interests would be recognized in the Prize Court, and yet the Court is invited by the claimants in this case to recognize a claim of an inferior order. The principle to be applied to the case of a pledgee must be the same in all cases, whether the amount advanced represents the whole or only part of the value of the goods, but in the latter case the taking of the account would place the Court in a position

(1) 5 C. Rob. 218; 1 Eng. P. C. 456.
(2) (1905) 2 Russ. & Jap. P. C. 39.
(3) (1905) 2 Russ. & Jap. P. C. 208.
(4) (1866) 5 Wall. 372.
(5) [1914] P. 218.
(6) (1814) 8 Cranch, 418.
(7) Spinks, 26; 2 Eng. P. C. 268.
(8) Nov. 23, 1914.

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of great difficulty, and there would be opportunities for putting forward dishonest claims which could not be properly tested. Lastly, there is the great authority of the American decision in *The Carlos F. Roses* (1), in which all the authorities, American and English, were considered, and in which the precise point involved in this case was decided against the contention put forward by the claimants. The duty of the Prize Court is to inquire whose is the property, and if it is enemy property to condemn it. The Prize Court recognizes British, allied, or neutral claims over property if they arise by the general law independently of contract, for example, in the case of freight. On the other hand, if the claim to enemy property does not arise under the general law, but is the result of contractual relations between a vendor and purchaser and a third party, then in the case of cargo, as well as in the case of a ship, the claim is not one which the Prize Court recognizes. The great repute and authority of the prize law of this country are due to the fact that the judges of this Court have refrained from dealing with each case without regard to principle in order to avoid hardship to individuals. The Court has always endeavoured to ascertain the true principle applicable to the facts of the case before it, and having ascertained the principle has applied it, although in particular cases the result may have involved some hardship. (2)

Cur. adv. vult.

THE CAPE CORSO.

Claim by a firm of British subjects, William Brandts, Sons & Co., of Fenchurch Avenue, London, to the cargo of timber of the British steamship *Cape Corso* (R. J. Hey, master), which vessel was detained for some days at Suez on and after August 7, and the cargo was seized on the arrival of the vessel at Brixham on August 26, 1914.

(1) 177 U. S. 655.

(2) In the course of the arguments the Attorney-General stated that he had authority for saying that a committee had been constituted, called the Prize Claims Committee, for the purpose of considering claims made by third parties against ships or cargoes which had been condemned, in order that the decisions of the Prize Court might not cause unfair suffering to those who had charges in respect of ships or cargoes.

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The following statement of facts is taken from the judgment of the President :—

"The subject-matter of the claim in the second case is a large quantity of valuable wood laden on board the steamship *Cape Corso*, a British vessel.

"The cargo was purchased from one Schütze of Otaru in Japan by one Leo Küpper of Hamburg, a German subject. The vessel was chartered to Küpper. The goods were shipped in Japan, and the vessel was bound for Rotterdam, or, at the option of the charterer, for Hamburg.

"By a business arrangement between Küpper and the claimants William Brandts, Sons & Co., the latter gave to Mitsui & Co., in London, on behalf of their house at Otaru, letters of credit authorizing them to negotiate drafts of Schütze on the claimants for the cargo purchased from him by Küpper.

"A certain number of bills of exchange were accepted by the claimants before the war, which fell due after the war, but which have now been paid.

"The bills of lading were made out to Schütze's order or assigns, and were indorsed generally by Schütze. They were in due course received by the claimants as security against their acceptances. The claimants then forwarded them to their agent at Hamburg to deliver up to Küpper against payment, and some of them were presented before the war. Certain collateral securities were given to the claimants by Küpper, in part by a guarantee of the Rheinische Creditbank Filiale Karlsruhe, and in part by a deposit with the claimants' agent in Hamburg. The transactions were not quite so simple as in the first case. Their effect has been stated and no further details need be given.

"The balance of account stated by the claimants to remain due from Küpper is 6104*l.*

"The claim was formulated by the claimants as follows :—

"A (1.) A declaration that the goods are their property.

"(2.) Release to them of the said goods.

"Alternatively—

"B (1.) A declaration that they are entitled to possession of the goods.

"(2.) Release of the goods to the claimants for the purpose of

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sale and retention by them out of the proceeds of sale of the amount paid by them for the bills of lading and of the amount of costs, losses, and expenses (if any).

"(3.) Alternatively for payment to them out of the proceeds of sale of the goods of the amounts referred to in (2.).

"In reference to the transactions between them, these claimants in writing to their German customer, Küpper, said: 'We shall be pleased to finance the wood shipments from Mr. Carl Schütze for your account on the basis as sketched by you.'

"Just as Brandts & Co. financed the wood shipments for their customer, so did Schröder & Co. finance the nitrate shipments for their customers, the Rhederei-Aktien-Gesellschaft von 1896."

1914. Dec. 17. *Maurice Hill, K.C.*, and *R. H. Balloch*, for the Crown.

Stuart Bevan, for the claimants.

Darby, for the shipowners.

The arguments of counsel were the same as in *The Odessa* (supra), except that the contention was raised by counsel for the claimants, William Brandts, Sons & Co., that a difference existed between the two cases owing to Küpper, the purchaser of the cargo of the *Cape Corso*, and his guarantors having, before the outbreak of hostilities and capture, refused to take up the bills of lading in respect of part of the cargo, with the result that the pledgees could have sold; but (as appears from the judgment) the fact of the refusal did not, in the opinion of the President, alter the property in the goods, and, therefore, in respect of the cargoes on the two vessels, the principles applicable were the same in both cases.

Cur. adv. vult.

1914. Dec. 21. SIR SAMUEL EVANS, PRESIDENT, read the following judgment:—

The claims to the cargoes in these two cases are of a like nature. There is no difference between them in any matters essential for my judgment, and the principles applicable must be the same in both. I will therefore deal with them together. [The President stated the facts as set out above, and continued:]

It was admitted for the claimants in each case (1.) that in law the property in the cargoes had been transferred to and become vested in the German purchasers, and that the latter were at all material times the legal "owners" of the cargoes; and (2.) that the claimants were merely pledgees of the bills of lading representing the cargoes as security for moneys advanced or agreed to be advanced.

The important questions of law now raised are whether the Prize Court should nevertheless regard the claimants as the real owners of the goods, and should therefore release the goods captured on the ground that they were not "enemy property"; or whether the Court should in some way take cognizance of their claims, and direct the captors or the marshal to pay them out of the proceeds.

The argument was presented ably and persuasively by Mr. MacKinnon, and the Court is indebted to him for his assistance. He admitted that no decisions of this or any other Court of Prize had given effect or even lent countenance to such a claim; but he urged that, side by side with the development of commercial dealings on the lines of those now presented, there should be such an extension of the law of prize as would protect people who, like the claimants, lent money on the security of cargoes or their bills of lading.

At the outset, two things must be remembered—first, that this is a Court of law, and, secondly, that the law to be administered here is the law of nations, i.e., the law which is generally understood and acknowledged to be the existing law applicable between nations by the general body of enlightened international legal opinion.

The decisions of a Court of law should proceed upon defined principles. Those principles have to be applied to ever varying sets of facts. But the Court has the function and duty not merely of deciding individual cases, but of determining them upon principles which shall be a guide to others as to what their positions and rights are in the eye of the law.

In the domain of international law, in particular, there is room for the extension of old doctrines or the development of new principles, where there is, or is even likely to be, a general

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The President.

acceptance of such by civilized nations. Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind. But the guides must not be lightly deserted or cast aside.

Already, in the course of the present war, I have had to deal with questions not remote from those raised in these proceedings; and in dealing with them I have striven after careful consideration to decide them in this spirit, with the guidance of the past and in the light of later experience.

In *The Marie Glaeser* (1) the positions of owners of enemy vessels, and of other persons, neutral and British subjects, claiming liens or charges upon the vessels, fell to be decided.

In *The Miramichi* (2) rules for determining the "ownership" of cargoes laden on an innocent ship had to be laid down.

In *The Marie Glaeser* (1) the decision was that in cases of capture no mortgages, liens, or charges upon an enemy ship could be set up in this Court against the captors.

In *The Miramichi* (2) it was held that in cases of seizure the "ownership" of or "property" in a cargo shipped during peace depends upon the municipal law governing contracts for the sale and purchase of goods. I must adhere to those decisions, unless and until they are corrected by a higher tribunal; and must apply the principles on which they were founded consistently to the facts of the present claims, unless there is good reason in reference to these cargoes for adopting different tests or doctrines.

As to the charges, or liens, no doubt a distinct line could be drawn between ships, and cargoes laden in them, if it were deemed right to make such a distinction. But it has never yet been made, I think, in any authority by the Prize Court of any nation. The reasons for not allowing any charges or liens against ships are set out in *The Marie Glaeser* (1) and the many authorities therein cited. Some of these authorities related to cargoes, and the same reasons were applied. I will not go over the same ground again. But I will just refer to three instances as examples where cargoes were dealt with upon the same footing covering the century from the time of Lord Stowell in 1805,

(1) [1914] P. 218. (2) Nov. 23, 1914.

through the period of the Crimean War in 1854, up to the Spanish-American War in 1900. They are *The Marianna* (1), *The Ida* (2), and *The Carlos F. Roses.* (3)

It appears to me that it is impossible to distinguish the two last-named cases from those with which I am now dealing. Nor do I see any reason for running counter to them.

In the first case now before the Court (*The Odessa*) the vessel and the cargo are both "properties" belonging to enemy subjects. What reason of any validity, or even plausibility, can there be for barring the claims of British or neutral subjects having liens or charges upon the vessel, and at the same time allowing similar claims against the cargoes? I can see none.

Accordingly, upon authority and principle, inasmuch as the claims of Schröder & Co. and Brandts & Co. are founded upon their positions as pledgees and not legal owners, they cannot, in my judgment, be allowed.

But it was further urged that although the claimants were not the legal owners of the cargoes, they had such a beneficial interest therein that their claims should be allowed. To accede to this proposition would be to open a door for all sorts of inquiries and calculations which has been consistently and firmly closed by my predecessors and by Courts of Prize. A consideration of the circumstances in the case of Brandts & Co.'s claim will at once show the difficulties. In the initial stage, how would a captor, who may have had good reason to believe that the cargo seized was enemy property, know how to act if he had to consider before seizure, or knew he might be confronted after seizure with, claims from pledgees or money-lenders in various parts of the world, whose advances might be either 5 per cent. or 95 per cent. or any other proportion of the value of the goods? Or if he might be subject to the taking of a general account as between banker and customer, or guarantor of customer, in order to ascertain the extent of the alleged charge or lien? When a later stage is approached, what would the captors, or the marshal, have to do? Are they to be parties to

(1) (1805) 6 C. Rob. 24; 1 Eng. P. C. 518.
(2) Spinks, 26; 2 Eng. P. C. 268.
(3) 177 U. S. 655.

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the taking of an account between the pledgors and pledgees, or persons possibly claiming under them; an account which ex hypothesi would during the war have to be taken in the absence of some of the parties? Such proceedings would be wholly foreign to the jurisdiction and working of this Court.

That persons may be losers during war time in pecuniary or commercial transactions with enemy traders is only too obvious. Loss is no test of legal rights. The claimants have rights of action against their customers for their full claims, which they can set in motion either during the war or after it. How far they might be fruitful is no concern of this Court.

In my judgment, the only safe guiding principle is to ascertain who are the legal owners of the cargoes; and if the goods are found to be the property in law of an enemy, to condemn them; or if they are the property of neutrals or British subjects, to release them, as was done in *The Miramichi*. (1)

There is one other matter to mention relating to the second case, lest it may be thought that it has been overlooked. Counsel for Brandts & Co. contended that in regard to part of the cargo claimed (namely, 2834 logs) both Küpper and his guarantors, the Rheinische Creditbank Filiale Karlsruhe, had before the outbreak of hostilities and capture refused to take up the bills of lading, and that thereupon the pledgees could have sold. Even if the fact of refusal were established, it is clear that, until the pledgees did sell, the general property in the goods remained in the owners, who had at any time the right to redeem.

I may further note that the facts upon this head were precisely similar in *The Carlos F. Roses* (2); the statement of them to be found at p. 679 of the report is as follows:—"The purchase of the goods, the drawing and cashing of the drafts, the endorsement and delivery of the bills of lading, all took place before the sailing of the vessel, and long before the declaration of the war, and before there was any reason to anticipate hostilities. The drafts were accepted before the war and were paid before the seizure of the vessel." Nevertheless, it was held that the claimants had no right to the goods as against the captors.

(1) Nov. 23, 1914. (2) 177 U. S. 655.

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THE ODESSA.
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My judgment, therefore, is that in none of the forms suggested can the claims in either case be allowed; and I must condemn the cargoes in both cases as lawful prize.

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for claimants: *Stibbard, Gibson & Co.; Coward & Hawksley, Sons & Chance.*

F. O. R.
T. L. M.

NAPIER *v.* NAPIER (OTHERWISE GOODBAN).

1915
Jan. 23, 26.

Nullity of Marriage—Refusal to allow Marital Intercourse—"Wilful and persistent"—Petition dismissed.

The refusal of marital intercourse, unless it be a wilful, steadfast and persistent refusal on the part of the woman, after attempts reasonably made on the part of the man, is not a sufficient ground for annulling a marriage at the suit of the latter.

Dickinson v. *Dickinson* (*otherwise Phillips*) [1913] P. 198 distinguished.

THIS was an undefended suit by the husband for nullity of marriage.

The respondent entered an appearance to the citation and cross-examined the petitioner when his evidence was taken before a special examiner appointed by the Court; but she did not attend the medical inspection, and no answer was filed on her behalf.

The material facts appear in the judgment of the learned President.

Le Bas, for the petitioner, cited *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) and submitted that this was a case of wilful refusal within the meaning of that case. He also referred to *W.* v. *W.* (*otherwise L.*). (2)

Cur. adv. vult.

Jan. 26. SIR SAMUEL EVANS, PRESIDENT. This is a petition by the husband, asking for a decree of nullity on the ground

(1) [1913] P. 198. (2) [1912] P. 78.

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The President.

that the marriage was never consummated, and alleging that the wilful and persistent refusal of the wife was the reason for non-consummation.

The marriage took place on March 19, 1907. The husband was about seventeen years of age at that time, but he describes himself as being 6 ft. 2 in. in height and as looking much older than he really was. His age was known to the respondent, who was some few years older than he. In the certificate he is put down as twenty-one. The engagement of these two young people was known to the mother of the respondent: her father was ill, and it was proposed that the engagement should not be made known for some time. But without the knowledge of either the father or mother of the respondent, the marriage took place.

The petitioner's evidence, which has been read, is to the effect that the respondent was willing to wait until the petitioner came of age, but the early marriage, and, to the extent I have stated, the secret marriage, was brought about at the instance of the petitioner. He had no means, though he had some expectations; and he was earning nothing. These facts were known to the respondent. It was part of the arrangement between them that the marriage should not be consummated until it could be with safety made known to the father of the respondent, who was suffering from very bad health at that time. The parties never occupied the same bedroom.

After the marriage, which was, apparently, one of affection, letters passed between the parties couched in very affectionate terms and certainly giving no indication of an intention to withhold ordinary marital rights at a future time.

On March 28, 1907,—nine days after the marriage—the wife writes to the husband this letter:—

"Fountel, Swanage.

"My very own Cecil,—Just a hurried letter, darling, to tell you I am going down to Ilfracombe on Tuesday next for a bit, and my sister is coming home. Mother wants to see me very much and I want to see her.

"Do you think you will be able to come down too and see her while I am here? She has told Dad about our engagement, and he took it very calmly, so now they both know, darling.

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Do try and go to Ilfracombe next week or the week after. My sister has been away for six months and she wants to come home for a bit. Oh! my darling, if only I had you here to kiss. I do hope you are keeping all right and not pining too much for your little girl. She is all yours, darling, and is absolutely true to her Cecil and always will be. We must be patient.

"Do go to Ilfracombe if you can. It's rather a long way, I know, but persuade them to let you. Don't worry your Granny about that 2*l.* 17*s.* Give her my love and a kiss. Ever so much for you, my darling boy. God bless you, my sweetest.

"Ever your own till death,

"Evelyn."

After the marriage, the parties separated at the respondent's father's door, and they had not seen each other since, when that letter was written.

A few days afterwards the petitioner went to Ilfracombe, and stayed in the house of his wife's parents. On the day of his arrival, he made a proposal to his wife which was described in this way in the petitioner's deposition: "I suggested to her that intercourse should take place that night. She refused. We occupied separate rooms and no intercourse took place." In cross-examination: "I think she fully understood my suggestion of having intercourse. I was not aware of any reason why she should refuse to have intercourse. I only asked her once. The nature of her reply was sufficient to discourage me." And, in re-examination: "I had promised her that intercourse should not take place until her parents were informed of the marriage. When I said . . . . that the nature of her reply was sufficient to discourage me I had in mind that promise." All that she did then was to remind him of that promise.

At that time, the parents of the respondent had not been informed of the marriage. On the next day, in some way not explained, a clerk to the petitioner's solicitors arrived at Ilfracombe and informed the respondent's mother that the marriage had taken place.

The petitioner left on that day, and since that time, which was in April, 1907, the petitioner has never seen the respondent at all.

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I have said he had no means to support her. He states that he left for Scotland shortly afterwards, and, while there, corresponded intermittently with her. He remained there about two years, and afterwards went to Norfolk for about a year.

In 1910 he left for South Africa. During this period of about three years he made no effort at all to see his wife.

I am not unmindful of the fact that the mother of the respondent wrote to him some five or six months after the marriage. The letter, which is dated November 2, 1907, is as follows :—

"Dear Cecil,—I have received a letter from your aunt, Miss Emily Napier, asking me on your behalf to allow Evelyn to write to you. I will allow you to correspond with her on condition you make some definite sign of making a living and really do your best to work hard, and I must have your promise to this effect before you write to Evelyn. You must also address Evelyn as Goodban when writing.

"Yours very sincerely,

"A. F. Goodban."

The petitioner did not answer that letter, and the respondent's mother wrote to him again under date November 8, 1907, as follows :—

"Dear Cecil,—Since writing and giving my consent to your corresponding with Evelyn I have found it necessary to tell her father of your unfortunate marriage, who is very angry indeed and refuses to allow her to have anything to do with you whatsoever. Evelyn tells me to say she has forgiven you the great wrong you have done her and her family, but she can never love you again as she did, after the deceitful way you have behaved to her, and that it is far better for her happiness and yours that you do not see or hear from each other any more.

"Believe me, sincerely yours,

"A. F. Goodban."

Nevertheless, the petitioner, having induced his wife to marry him in the circumstances already referred to, should have done his best to meet her personally, and to overcome any difficulties which his conduct had brought about.

In 1911, while in South Africa, the petitioner communicated

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with his solicitors here, and sent through them a letter to the respondent, which duly reached her, and in which he suggested that they should resume their correspondence with a view to their living together as man and wife. He sent the letter through his solicitors because, he said, he did not know his wife's address at that time.

Between April and September, 1914, he was in England; and, in June, wrote to his wife through his solicitors. I cannot think that he could not have found out where his wife was, if he had wanted to. He only communicated with her by letters through his solicitors. In these circumstances, the solicitors for the respondent wrote on her behalf, stating that she declined either to correspond with the petitioner or to see him.

What I have to determine is whether there has been such a persistent and wilful refusal on the wife's part as will entitle the husband to a decree of nullity.

The case upon which these proceedings were, no doubt, instituted is *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1), in which I went further than any of my predecessors in granting relief. In the course of my judgment in that case I said: "By wilful refusal I do not mean a mere temporary unwillingness due to a passing phase, or the result of coyness, a feeling of delicacy, affected or real, or a nervous ignorance which might be got rid of or cured by patient forbearance, care, and kindness; but a wilful, determined, and steadfast refusal to perform the obligations and to carry out the duties which the matrimonial contract involves." And at the end of my judgment (at p. 207) I used these words: "Where, as I find in this case, the suit is brought in good faith, and the consummation of the marriage has been prevented, after repeated attempts reasonably made on the part of the husband, by the wilful, determined, and steadfast refusal of the wife, and the refusal is threatened to be, or likely to be, persistent, I prefer to take the direct course of saying that this is a valid ground for annulling the marriage, instead of having recourse to the expedient of stating that I draw an inference of some physical abnormality or incapacity which I do not believe to exist."

(1) [1913] P. 198, at p. 204.

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I do not want to go through the facts of that case. It will be remembered that the parties slept together and repeated attempts were made by the husband to bring about the consummation of the marriage, and that effective steps were taken by the wife to frustrate every attempt, and to make consummation impossible. It is sufficient to say that the facts of that case were miles away from those in the case now before me.

In this case the petitioner has not made reasonable, or any real, attempts to consummate the marriage. He went away from the wife shortly after the marriage; and now, seven years after the parting, which was not unfriendly, he seeks to have the marriage annulled on the ground that his wife has wilfully and persistently refused to allow him to consummate the marriage. So far from wilful and persistent refusal by the wife, the state of things has been, in my judgment, brought about by the heedless —I had almost said the callous—conduct of the husband.

The petition must be dismissed.

Solicitors for petitioner: *Markby, Stewart & Co.*
Solicitors for respondent: *Tweedale, Sons & Lees.*

H. D. G.

HIGH COURT OF JUSTICE. 1914
PROBATE, DIVORCE, AND ADMIRALTY DIVISION. *Nov.* 23.

ADMIRALTY.

[In Prize.]

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[1914 No. 186.]

Prize Court—British Ship—Cargo shipped by Neutral before War declared or imminent—Ship on High Seas when War declared—Documents of Title refused by German Buyer—Advances by Neutral Banker.

A cargo shipped under a c.i.f. contract by a neutral to a German buyer on a British vessel before the declaration of, or imminence of, war between Great Britain and Germany *held* not to be subject to seizure and condemnation by the Prize Court, the property in the goods not having passed to the enemy subject, nor the documents representing the goods taken up by him, and money having been advanced to the neutral seller on the faith of the documents by a neutral banker.

Questions as to liability for seizure of enemy goods on British vessels discussed.

Claim by Muir & Co., of New York, U.S.A., merchants, and the Guaranty Trust Company of New York, bankers, in respect of a part cargo of wheat purchased by George Fries & Co., of Colmar, and Gebrueder Zimmern & Co., of Mannheim in the German Empire, shipped at Galveston, Texas, on board the British steamship *Miramichi* for conveyance to Rotterdam and seized at Eastham, as enemy property, by the Customs on behalf of the Crown.

The following statement of facts is taken from the judgment of the President :—

"The subject-matter of the claim in this case is a part cargo of 16,000 bushels of wheat carried on the steamship *Miramichi*, which was seized or captured as enemy property on September 1, 1914, in the circumstances hereinafter mentioned.

"The steamship *Miramichi* was a British ship. The cargo of wheat to which the claim relates was shipped at Galveston, Texas, and was stowed, with other wheat, in holds 1, 4, and 6 of the vessel. It was shipped in the month of July, 1914, before the commencement of the war, and without any anticipation of

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war. It was destined for the port of Rotterdam, and was intended to be delivered, as to part, to George Fries & Co., of Colmar, as purchasers of 8000 bushels, and, as to the other part, to Gebrueder Zimmern & Co., of Mannheim, as purchasers of 8000 bushels. Both these firms were German firms, and at the time of seizure or capture of the cargo were enemy subjects.

"The two transactions were separate; but there is no distinction in substance, or from the legal aspect, between the two. It will therefore be sufficient to deal in this judgment with one of the cases; and I will take the first, namely, the case of the sale by Messrs. Muir & Co. to Fries & Co.

"The cargo of wheat destined for Fries & Co. was, as I have said, laden on board the British steamship *Miramichi*. On her voyage towards Rotterdam, her owners by telegraph directed the vessel to proceed to Queenstown for orders by reason of the outbreak of war. At Queenstown the owners communicated with the British Admiralty and asked their instructions as to whether the steamship could proceed to Rotterdam, as the cargo was destined for German merchants. Permission to proceed to Rotterdam was refused, and accordingly the vessel proceeded to the port of Eastham, in the Manchester Ship Canal, as the best port for the disposal of the cargo.

"A question might have arisen as to whether the cargo was captured at sea or seized in port. But that makes no material difference in this case, and it is agreed that the cargo was seized in the port of Eastham.

"The seizure was on September 1, 1914. The Crown claims the cargo as prize or as droits of admiralty. The claimants, on the other hand, contend that the cargo was not subject to seizure as it did not belong to enemy subjects, but to themselves as neutrals, being citizens of the United States of America."

1914. Nov. 2. *Sir J. Simon, A.-G.*, and *R. A. Wright*, for the Crown claiming condemnation of the part cargo on the *Miramichi* as being enemy property.

Leslie Scott, K.C., and *R. H. Balloch*, for the claimants.

The argument of counsel on behalf of the Crown that the test as to the right of seizure and condemnation depended on the

answer to the question "on whom is the risk at the moment of capture" is set out at length in the judgment, and the contrary contention of counsel for the claimants, namely, that, where goods are shipped before war, the true criterion to apply is "in whom is the property, in the sense of the beneficial ownership," also appears from the judgment.

Nov. 23. SIR SAMUEL EVANS, PRESIDENT. [After stating the facts already set out the learned President continued:] The contest between the Crown and the claimants may be shortly stated as follows:

The contention of the Attorney-General for the Crown was that the cargo at the time of seizure was at the risk of subjects of the German Empire, then at war, as purchasers, and therefore was subject to seizure on behalf of the Crown. The contention of the claimants, on the contrary, was that the cargo was their property, and therefore could not be lawfully seized.

The facts as to the contract for sale and purchase of the cargo must now be stated in substance, but briefly.

I will premise that the contract, and all material transactions in relation to it up to the time of seizure of the cargo, were entered into before the war, and in entire innocence of any anticipation of war. In short, all the transactions so far as concerned the claimants were carried out in times and conditions of peace. The claimants were the sellers of the goods, and their bankers who discounted the bill of exchange. They have made common cause, and no distinction need be made between them in this judgment. I will describe the claimants, Messrs. Muir & Co., as "the sellers," and Fries & Co., the German merchants, as "the buyers."

The sellers contracted to sell the cargo to the buyers on June 25 for shipment during the month of July, 1914, from a port of U.S.A. direct or indirect to Rotterdam at a price to include cost, freight, and insurance; in other words, the contract was what is so well known as a c.i.f. contract. Payment (or in the American terminology "reimbursement") was to be "by check against documents." The sellers were to furnish policies of insurance, or certificates of insurance (free of war risk). A

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clause for settlement of disputes in London was included, which shows (apart from anything else) that any disputes were to be determined according to English law.

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The sellers had bought the wheat to enable them to fulfil their contract with the buyers from C. B. Fox, a grain merchant in Galveston.

The wheat was shipped by Fox at Galveston on July 23, 1914. The bill of lading was given in favour of Fox, the shipper, and was made out unto the order of one Davis, or to his or their assigns. It was indorsed generally, and in due course the sellers paid Fox for the wheat and obtained the bill of lading. They did not indorse it in favour of the buyers, and it remained a bill of lading only indorsed generally.

The necessary insurances were effected and the certificates of insurance were obtained by the sellers on July 23.

On July 28 the sellers drew a bill of exchange upon the buyers, and, according to the statement of the Attorney-General, discounted it with the bankers (the Guaranty Trust Company of New York, who have joined them as claimants). On the same date they deposited with the bankers the bill of lading and certificates of insurance to be delivered up on payment by the buyers through a Berlin bank of the amount due on the bill of exchange for the cost and insurance, less the freight, which was credited, as it was to be paid for by the buyers on delivery.

On the same date also the original documents were forwarded to the Berlin bank for credit of the New York bank, by the steamship *Savoie*, which sailed from New York on July 29 and arrived at Le Havre on August 5; and duplicate documents were forwarded by the steamship *Carmania*, which sailed from New York on July 29 and arrived at Liverpool on August 7. The buyers were duly notified of these matters, and an invoice was forwarded to them by the sellers on the same day (July 28) with all the necessary particulars of the shipment, bill of exchange, and documents.

So far as the buyers are concerned, no further information was given to the Court except that the documents were tendered to them, and that on the tender they refused to accept the documents,

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or to pay the sum due under the bill of exchange and indorsed on the bill of lading as follows: "Refused on account of late production, nearly one month after normal due date. . Colmar, September 3, 1914. Geo. Fries."

That reason was a mere excuse; the real reason, no doubt, was that war had broken out. The sellers, therefore, or their bankers, still hold the bill of lading, and the bill of exchange remains unpaid.

These, I think, are all the material facts.

The question of law, as I have stated, is, was the cargo on September 1 subject to seizure or capture by or on behalf of the Crown as droits of admiralty or prize?

Before this question is dealt with, I desire to point out, and to emphasize, that nothing which I shall say in this case is applicable to capture or seizure at sea or in port of any property dealt with during the war, or in anticipation of the war. Questions relating to such property are on an entirely different footing from those relating to transactions initiated during the happier times of peace. The former are determined largely or mainly upon considerations of the rights of belligerents and of attempts to defeat such rights. I will refrain from discussing these matters, and will only refer to such authorities as *The Sally* (1), heard on appeal by the Lords Commissioners of Appeals in Prize in 1795, *The Packet de Bilbao* (2), and *The Ariel* (3), for the principles applicable in the Prize Court during a state of war.

In the case now before the Court, there is no place for any idea of an attempt to defeat the rights of this country as a belligerent; and the case has to be determined in accordance with the principles by which rights of property are ascertained by our law in time of peace.

The main contest was as to the right test to apply in these circumstances for determining whether a particular property was subject to seizure or capture. Another point was taken and argued, chiefly by junior counsel for the claimants, that in any event enemy property in a British ship could not be seized in port or captured at sea.

(1) (1795) 3 C. Rob. 300, note. (2) (1799) 2 C. Rob. 133.
(3) (1857) 11 Moo. P. C. 119.

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I will state the contention and propositions submitted by the learned Attorney-General in his own words.

He said, "My first proposition is that the test of the right to capture and sale is the answer to the question on whom is the risk at the moment of capture? That is to say, who suffers if the goods are captured? Applying that test, the American claimants here would have had a 'jus disponendi' because they are holding the bill of lading, which has not been indorsed, and therefore they would have to that extent of course a special property, a property interest in the cargo, but they would not have a general property in the cargo: still less would they have the risk; and there is a third proposition, which is really a development of the other proposition, namely, the American sellers had a vested right of payment, whatever happened to the goods on the tender of the documents; and I will add as a point for my third proposition that for the purpose of determining whether the cargo is good prize (which is quite a separate question from the other), the material question is not the abstract question of property, but whether it is an enemy or a neutral who will suffer if the cargo is condemned—on whom is the risk?" And summing it up the learned Attorney-General later submitted, "If my main proposition is right, in a Prize Court one is not concerned with these niceties about the abstract law of property; but the point really is, at the moment of capture, the goods being on the high seas, is it or not open to the consignor to compel payment by the consignee? That is the real test. Then plainly I am entitled here to the condemnation of the goods."

As I have intimated, it was subsequently assumed, and for this purpose agreed by the Attorney-General, that the goods were seized when afloat in port; but that makes no material difference.

The contrary contention of Mr. Leslie Scott for the claimants was that "the true criterion to apply where goods are shipped before war is, whose goods are they? In whom is the property—in the sense of a beneficial ownership of the goods—vested?"

Very difficult questions often arise at law as to when the

property in goods carried by sea is transferred, or vests; and at whose risk goods are at a particular time, or who suffers by their loss.

These are the kind of questions which are often brushed aside in the Prize Court when the transactions in which they are involved take place during war or were embarked in when war was imminent or anticipated.

But where, as in the present case, all the material parts of the business transaction took place bona fide during peace, and it becomes necessary to decide questions of property, I hold that the law to be applied is the ordinary municipal law governing contracts for the sale and purchase of goods.

Where goods are contracted to be sold and are shipped during peace without any anticipation of imminent war, and are seized or captured afloat after war has supervened, the cardinal principle is, in my opinion, that they are not subject to seizure or capture unless under the contract the property in the goods has by that time passed to the enemy.

It may be that the element of risk may legitimately enter into the consideration of the question whether the property has passed or has become transferred. But the incidence of risk or loss is not by any means the determining factor of property or ownership. (Cf. s. 20 of the Sale of Goods Act, 1893.) The main determining factor is whether according to the intention of seller and buyer the property had passed.

The question which governs this case, therefore, is, whose property were the goods at the time of seizure?

This principle is consonant with good sense, and with the notion of what is right in commercial dealings. It is also in accordance with the doctrines adopted by the eminent jurists who have become authorities on the law of nations, and applied in the decisions of our Prize Courts (see, e.g., *The Cousine Marianne* (1); *The Ida* (2); *The Abo* (3); *The Vrow Margaretha* (4); and *The Ariel* (5)).

(1) (1810) Edw. 346.
(2) (1854) Spinks, 26.
(3) (1854) Spinks, 42.
(4) (1799) 1 C. Rob. 336.
(5) 11 Moo. P. C. 119.

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The learned Attorney-General by the tenor of his argument rendered it almost unnecessary for me to go through the many authorities dealing with the vesting or transfer of property under such a contract, or to discuss the question whether the property in this case had, on September 1, passed from the sellers and become vested in the buyers.

He did not, as I understood, argue that the property had passed to the enemy buyers. He admitted that the neutral sellers had a jus disponendi, because they held the bill of lading, which was not indorsed; although possibly he may have intended to qualify this admission by saying that "Therefore the sellers would have, to that extent, a special property" in the goods.

But at any rate, as he did not contend that by law the property had passed to the buyers, I think it sufficient to deal very briefly with the matter, and to state my conclusions without elaborating the grounds.

In my opinion the result of the many decisions from *Wait* v. *Baker* (1) up to *Ogg* v. *Shuter* (2), *Mirabita* v. *Ottoman Bank* (3), and thence up to the Sale of Goods Act, 1893; and of the provisions of the Sale of Goods Act, 1893, itself, following closely on these matters the judgment of Cotton L.J. in *Mirabita* v. *Ottoman Bank* (3); and of the decisions subsequent to the Act, e.g., *Dupont* v. *British South Africa Co.* (4), *Ryan* v. *Ridley* (5), and *Biddell* v. *E. Clemens Horst* (6), is that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a jus disponendi over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid.

It follows that the goods seized were the property of the American claimants, and were not subject to seizure; the Court decrees accordingly, and orders the goods to be released to the claimants.

(1) (1848) 2 Ex. 1.
(2) (1875) 1 C. P. D. 47.
(3) (1878) 3 Ex. D. 164.
(4) (1901) 18 Times L. R. 24.
(5) (1902) 8 Com. Cas. 105.
(6) [1911] 1 K. B. 214, 934; [1912] A. C. 18.

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The other point referred to remains; and as it was argued and has been foreshadowed in other cases, I will deal with it, although, in view of the decision just given, it becomes immaterial.

It is that as the cargo was in a British ship, it could not be seized or captured even if it was enemy property.

In my opinion this proposition is wholly lacking in foundation. No authority was cited for it. Such a contention has never been put forward, because, as I think, no one has thought that it could prevail.

Enemy property at sea or in port can be captured or seized except where an express immunity has been created.

Abundance of authority exists for this in the acknowledged books of international jurists. I will only cite one, namely, Wheaton; I will cite from what is regarded as the best edition, that of Mr. Dana, published in 1866. After an exhaustive and most interesting account of the right of capture according to the usage of war on land and on sea, Wheaton wrote as follows: "Section 355. The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the destruction of the enemy's commerce and navigation, the sources and sinews of his naval power—which object can only be attained by the capture and confiscation of private property."

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I will also cite Mr. Dana's note upon this section as it was written years after the Declaration of Paris.

"Note 171. Distinction between enemy's property at sea and on land. The text does not present the principal argument for the distinction observed in practice between private property on land and at sea; nor, indeed, has this subject been adequately treated upon principle, if that has even been attempted, by most text-writers. War is the exercise of force by bodies politic, for the purpose of coercion. Modern civilization has recognised certain modes of coercion as justifiable. Their exercise upon material interests is preferable to acts of force upon the person. Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea; for it is a subject of taxation, contribution, or confiscation. The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land. Some of the reasons for this are the infinite varieties of the character of such property—from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties, the need of much of it to support the life of non-combatant persons and of animals; the unlimited range of places and objects that would be opened to the military; and the moral dangers attending searches and captures in households and among non-combatants. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily; embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea, upon which it is sent, is res omnium, the common field of war as well as of commerce. The purpose of maritime

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commerce is the enriching of the owner by the transit over this common field; and it is the usual object of revenue to the power under whose government the owner resides.

"The matter may, then, be summed up thus: merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is prima facie a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore some are of this character and some not. There are very serious objections of a moral and economical nature to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the prima facie right of capture. To merchandise at sea these objections apply with so little force that the prima facie right of capture remains."

There is no distinction now to be made between capture at sea and seizure in port; and apart from the practice introduced by the Declaration of Paris in favour of neutral vessels it does not matter in what ships the cargoes seized or captured may happen to be. According to the Order made in Council, in 1665, as to the rights of the Lord High Admiral in former times, which are now the rights of the King in his Office of Admiralty, "all ships and goods coming into ports, creeks, or roads of England or Ireland, unless they come in voluntarily on revolt or are driven in by the King's cruisers," belonged to the Lord High Admiral, and now belong to the Crown, and according to Lord Stowell, "Usage has construed this to include ships and goods already come into ports, creeks, or roads, and these not only of England and Ireland, but of all the dominions thereunto belonging": see *The Rębeckah.* (1)

It has never been urged that enemy goods are free from capture or seizure if they happen to be in British ships.

This is, no doubt, the reason why there are no reported judgments upon the point, but if decisions of Prize Courts are desired to show that enemy cargoes in British ships have been captured, reference can be made to *The Conqueror* (2) and *The Mashona* (3), and the *Journal of Comparative Legislation,*

(1) (1799) 1 C. Rob. 227. (2) (1800) 2 C. Rob. 303.

(3) (1900) 10 Cape Times L. R. 163.

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1900, p. 326. See also *The Cargo ex Emulous* (1), sub nomine *Brown* v. *The United States* (2), for the opinion of Story J. in similar cases.

As to the suggestion that the right of seizure or capture of enemy property carried as cargoes in British ships no longer exists after the Declaration of Paris, it is obvious that the Declaration only modified or limited the right in favour of neutrals for the benefit and protection of the commerce of neutrals and in the interest of international comities, and did not in any other respect weaken or destroy the general right.

It is well known that the United States of America refrained from acceding to the Declaration of Paris because they desired that all property of private persons should be exempted from capture at sea—to which most other States have always refused to agree.

And in practice what would become of such cargoes? A British ship could not, in times of war, carry it or hand it over to the enemy either directly or through any intermediary, as it is not permitted to her to have any intercourse with the enemy.

In my view it is abundantly clear that enemy goods carried in British vessels are subject to seizure in port and capture at sea in times of war.

As the cargo has been sold, the order of the Court will be for the payment out of the proceeds to the claimants.

The Attorney-General. I ask for a reasonable time for appealing.

THE PRESIDENT. Certainly. Stay of proceedings for three weeks, and, if notice is given for appeal, stay of proceedings will be till the hearing of the appeal.

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for claimants: *Thomas Cooper & Co.*

(1) (1813) 1 Gallison, 563. (2) (1814) 8 Cranch, 110.

T. L. M.

BROWN *v.* BROWN.

1915
Feb. 25;
March 2.

Divorce—Practice—Evidence—Cross-examination—Suggested Act of Adultery, not charged in Petition—Question excluded—Evidence Further Amendment Act, 1869 (32 & 33 *Vict. c.* 68).

It is contrary to the spirit of the Evidence Further Amendment Act, 1869, s. 3, that a witness, called to give evidence in any proceeding instituted in consequence of adultery and having given evidence in the same proceeding in disproof of his or her alleged adultery, should be questioned as to an act or acts of adultery not alleged in the pleadings.

A respondent in a divorce suit, having denied upon oath the charges alleged in the petition, was asked whether he had not committed adultery on an earlier occasion, not charged in the petition; but, objecting to answer, he was not compelled to do so, and the question was disallowed.

This was the petition of the wife, praying for the dissolution of her marriage on the ground of the alleged cruelty and adultery of the husband, who by his answer denied the charges.

The parties were married in September, 1908, and the only living issue of the marriage was born in July, 1909.

The petition was filed in October, 1914, and the only charges of adultery were:—

That on or about the 3rd day of July, 1910, at (the residence of the parties) the said (husband) committed adultery with some woman.

That on or about the 7th day of June, 1914, at (the address named) the said (husband) committed adultery with some woman.

That in or about June, 1914, the said (husband) committed adultery with some woman and thereby contracted a venereal disease.

The petition came on for hearing before Sir Samuel Evans, President, sitting without a jury, on February 25, 1915, when the petitioner's case was heard and the case was adjourned until March 2.

The respondent's case was then heard, and in the course of the cross-examination of the respondent the point, which is the only one calling for report, arose.

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BROWN v. BROWN.

Barnard, K.C., and *Bayford*, for the petitioner.

Marshall-Hall, K.C., *W. O. Willis*, and *Beddington*, for the respondent.

In the course of the cross-examination of the respondent, *Barnard, K.C.*, for the petitioner, asked him whether he had not committed adultery shortly before or shortly after the birth of the child of the marriage.

Marshall-Hall, K.C., objected to the question. The husband has not denied adultery at large, and there is no such general charge in the petition as could possibly justify the question. [He cited *Babbage* v. *Babbage and Manning* (1) and referred to the Law of Evidence Further Amendment Act, 1869. (2)]

[SIR SAMUEL EVANS, PRESIDENT. I do not think that that case touches the point.]

Barnard, K.C. This class of question has frequently been put and allowed. [He referred to *Cowley* v. *Cowley*. (3)]

SIR SAMUEL EVANS, PRESIDENT. The nearest case seems to be *Brown* v. *Brown and Paget, the Queen's Proctor intervening* (4), but in that case Sir James Hannen does not go the length of saying that his ruling would apply to a case like this. In the present case, I am of opinion that it would be contrary to the spirit of the statute to allow the question; and it is, to my mind, at least doubtful whether to allow it would be within even the letter of the statute.

In *Allen* v. *Allen and Bell* (5) Lopes L.J. said: "It is important to consider the state of the law of evidence when

(1) (1870) L. R. 2 P. & M. 222.

(2) Sect. 3 of the Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), is as follows:—

"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

(3) *The Times*, Jan. 20, 21, 29; Feb. 2, 3, 1897.

(4) (1874) L. R. 3 P. & M. 198.

(5) [1894] P. 248, at pp. 254, 255.

Glennie v. *Glennie* (1) was decided. The Evidence Acts of 1851 and 1853 excluded from their operation the parties to any proceedings instituted in consequence of adultery. In 1863, when *Glennie* v. *Glennie* (1) was decided, doubts were entertained as to how far the competency of witnesses in cases of adultery had been recognized in the Divorce and Matrimonial Causes Act, 1857, which founded the new Divorce Court. In 1869 an Act (32 & 33 Vict. c. 68) for the further amendment of the law of evidence was passed, which rendered parties to proceedings instituted in consequence of adultery competent witnesses, subject to a proviso that they were not liable to be asked, or bound to answer, any question tending to shew that they had been guilty of adultery, unless they had in the same proceedings given evidence in disproof of it. We understand this to mean that a party tendering himself or herself as a witness for the purpose of disproving an act of adultery is not protected from being cross-examined as to other acts of adultery, if these last be charged in the proceedings." That, being no more than a dictum, may not be binding on this Court; but, in my view, it was not the intention of the Legislature, when passing that Act, to allow a party to the suit who gives evidence as a witness to be questioned concerning adultery which has not been alleged in the pleadings. I, therefore, exclude the question.

The evidence by and on behalf of the respondent having concluded,

SIR SAMUEL EVANS, PRESIDENT, in the course of his judgment, finding in favour of the respondent on all the charges and dismissing the petition, said: Having ruled against the admissibility of the question put to the respondent in cross-examination, I think it right, as I am acting as judge and jury, to state that, if the question had been put, and if admission had been made by the respondent, in answer thereto, that he had been guilty of adultery about five years before, my conclusions and judgment upon the charges which have now been investigated would be the same.

(1) (1863) 3 Sw. & Tr. 109 (*Glennie* v. *Glennie and Bowles*).

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I may add that I am surprised that so serious and important a point as that which was raised in the course of this case has apparently never been raised and decided before, during the long period of over forty years since the Act of 1869 came into operation. The petition is dismissed, but the wife will have her costs.

Solicitors for petitioner: *Indermaur & Brown, for Webster & Co., Sheffield.*

Solicitors for respondent: *Arthur Neal & Son, for Arthur Neal & Co., Sheffield.*

H. D. G.

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Feb. 8.

IN THE ESTATE OF JACOB SCHIFF.

Probate—Practice—Administration—Intestacy—Alien Enemies Next of Kin—"Special Circumstances"—Probate Act, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Trading with the Enemy (Amendment) Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 2, *sub-s.* 2—*Grants to be taken by the Public Trustee as Custodian.*

In cases where persons entitled to the assets of a deceased person are alien enemies, the practice laid down now and for the future is that the Public Trustee, as custodian, shall take a grant of administration, by reason of the "special circumstances," under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77).

THIS was a motion for a grant of administration, under s. 73 of the Probate Act, 1857, to a creditor who was a naturalized British subject of German origin.

Jacob Schiff, the deceased, died in England on October 28, 1914, a bachelor, without parent and intestate, leaving as his next of kin a brother and a sister. By an unattested testamentary document the deceased purported to bequeath the whole of his estate to his said sister and a nephew. All the three relatives in question were alien enemies resident in Germany. The estate within the jurisdiction of the Court amounted in value to 118*l.*, besides certain stocks and shares, and the sum of about 733*l.* cash. There were debts a small amount of which had been discharged by the applicant, who

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was a naturalized British subject, and who was named in the unattested testamentary document as executor and was also a creditor of the deceased, for funeral expenses and other small sums paid by him since the death.

The Treasury Solicitor had been communicated with and offered no opposition to a grant being made either to the Public Trustee or to the applicant, the applicant to be restrained from parting with any assets without the direction of the registrar. The Public Trustee refused to assume the burden of a grant unless the deceased could be shown to possess an English domicil, which, according to the view expressed by or on behalf of the Public Trustee, did not appear to have been established.

The deceased was a German who had resided for some years in England, and who, at the time of his death, had contemplated applying for letters of naturalization, with a view to becoming a member of the London Stock Exchange.

H. Durley Grazebrook, in support of the motion, referred to the case of *In the Estate of Hermann Koenigs*. (1)

BARGRAVE DEANE J. referred to the Trading with the Enemy (Amendment) Act, 1914 (5 Geo. 5, c. 12), s. 2, sub-s. 2, and (after consulting with Sir Samuel Evans, President) said: The President agrees with me, that the Public Trustee, as custodian, is the proper person to take a grant of administration in this and in all future cases of a similar nature.

Order accordingly.

Solicitors: *Michael Abrahams, Sons & Co.*

(1) [1915] W. N. 24.

H. D. G.

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Feb. 10, 15.

KING *v.* KING.

Divorce—Practice—Adultery of Petitioner—Pleading—Form of Petition and Prayer—Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 31—*Discretion of the Court to grant Decree of Dissolution of Marriage.*

A petitioner who intends to ask the Court to exercise the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, by granting a decree dissolving the marriage, although the petitioner has during the marriage been guilty of adultery, must set out in the body of the petition the misconduct which the Court is requested to excuse, and must, in the prayer at the conclusion of the petition, specifically ask that the discretion may be exercised.

This was a petition by the wife for dissolution of marriage on the grounds of the desertion and adultery of the husband.

In his answer the husband alleged that the petitioner had committed adultery with a man (named).

The petitioner, in her reply, denied this counter-charge.

At the hearing the respondent withdrew the counter-charge, but the petitioner, nevertheless, admitted that it was true, and she asked the Court to exercise in her favour the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857.

The only point calling for a report was as to the practice to be followed in regard to the form of the pleading in such cases.

Barnard, K.C., and *Willock*, for the petitioner.
Le Bas, for the respondent.

Bargrave Deane J. said that he had had occasion not long ago to express his view that in such cases the petitioner should, at the outset, lay before the Court the fact of the adultery of the petitioner, and should specifically pray the Court to exercise its discretion.

Cur. adv. vult.

Feb. 15. Bargrave Deane J. (in the course of his judgment, exercising his discretion in favour of the petitioner, on grounds not calling for any report) referred to the views already

expressed by him in the case of *Hampson* v. *Hampson* (*The King's Proctor showing Cause*) (1) and said: In that case the wife went into the witness-box and on oath denied her misconduct. Here, there is simply a denial in her pleading in reply to the counter-charge made against her in the husband's answer to her petition. In the course of my judgment in that case I said: "The result . . . . is that against every feeling I have, except one, I am going to let this woman have her decree; but, in doing so, I wish it to be clearly understood that I will not hereafter, whatever may be the effect upon the future of the parties, in any case that may come before me, give any assistance to any person who deliberately commits perjury and deceives the Court, not only by keeping back material facts, but in denying on oath the existence of such facts. If in any future case the facts should be pointed to, as resembling those in the present instance, I wish it to be clearly understood that this case will not bind me; and I will take care to see in future that people who come to this Court, as petitioners, asking for the exercise of the discretion given by s. 31, shall come to the Court . . . . honestly admitting their faults at the outset."

In the case before me, Mr. Powell, the petitioner's solicitor, said that he had not seen the report of the judgment referred to; but no such excuse will avail hereafter.

I lay this down as a rule in all cases that may come before me. In future I will grant no relief or assistance to any petitioner guilty of adultery, unless in the petition the misconduct sought to be excused is admitted, and, in the prayer, the discretion of the Court is specifically asked for. This will put the Court in the position of knowing, at the outset, what is the nature of the case it is going to deal with.

Decree nisi, with costs, and custody of the children.

Solicitors for petitioner: *Powell, Burt & Lamaison.*
Solicitors for respondent: *Law & Worssam.*

(1) [1914] P. 104.

H. D. G.

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July 31.

THE LEON BLUM.

[1914 Folio 2.]

Admiralty—Salvage—Claim by Tug Owner against Cargo Owner—Agreement between Shipowner and Tug Owner as to no Salvage—Protection of Seamen against Abandonment of Right to Salvage—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 156.

Where a vessel carrying cargo was being towed under a contract made between the owners of the tug and the owners of the vessel in tow on the terms of "no cure, no pay, no salvage charges," and before the towage came to an end the vessel was in danger, and salvage services were rendered by the tug to ship and cargo, on the question whether the tug owners could claim salvage remuneration from the cargo owners:—

Held by the President (Sir Samuel Evans), that such a claim could be made by the tug owners against, and salvage remuneration recovered from, the cargo owners.

Obligations of a tug towards the tow under a towage contract considered, and the protection afforded to seamen under the Merchant Shipping Act, 1894, in respect of their right to salvage, referred to.

Action of Salvage.

Motion to stay proceedings.

The plaintiffs were the owners, master, and crew of the steam tug *Vanquisher*.

The defendants were the owners of cargo lately laden on board the *Leon Blum*, and (by order) the owners of the *Leon Blum*.

On December 9, 1913, the *Leon Blum*—a full rigged steel ship of 2733 tons register, belonging to the port of Nantes in the Republic of France—was on a voyage from Pisagua to Liverpool, via Falmouth, with a cargo of nitrate, and in tow (from Falmouth) of the plaintiffs' tug *Vanquisher*. She had arrived off the Formby lightship, in charge of a pilot, when, as it was alleged by the plaintiffs in their statement of claim, her position became critical owing to her port anchor, suddenly and without warning, dropping and the chain running out, that the tug *Vanquisher* thereupon rendered salvage services, as she, at great risk, succeeded in holding the *Leon Blum* whilst the anchor was hove up, thereby saving her from grounding, and it was further alleged

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that the tug prevented the vessel from subsequently going ashore and the cargo being lost.

On January 1, 1914, the plaintiffs, as the owners, master, and crew of the steam tug *Vanquisher*, issued a writ against the owners and parties interested in the cargo lately laden on board the *Leon Blum* claiming remuneration for salvage services rendered to the cargo laden on board the French vessel; and, on February 12, delivered their statement of claim setting out the facts upon which they relied. On March 19 the owners of the *Leon Blum*, the Société Nouvelle d'Armement, applied for an order that all further proceedings in the action be stayed on the ground that the plaintiffs, the owners of the steam tug *Vanquisher*, contracted with the applicants, the owners of the *Leon Blum*, prior to the commencement of the towage of the *Leon Blum* (during which towage the salvage services the subject-matter of the action were alleged to have been performed), that no claim should be made against the owners of the cargo on board the *Leon Blum* in respect of any salvage services that might be rendered by the *Vanquisher* to the *Leon Blum* during the said towage, and that the proceeding with this action was in breach of the said contract.

On April 7 the motion to stay came before Bargrave Deane J., and, after hearing counsel (1), that learned judge directed that, upon undertaking being given on their behalf to find security for costs, the Société Nouvelle d'Armement, the owners of the vessel *Leon Blum*, be made defendants to the action, and furnish their defence within fourteen days, the action to be placed in the list for hearing on May 21 for argument on the point of law (as to the construction of the contract) only, and that the witnesses as to the alleged salvage services should not be in attendance without further order. All questions of costs reserved to the trial. Leave to appeal.

On May 9 the motion, by way of interlocutory appeal, came before the Court of Appeal (Buckley L.J. and Kennedy L.J.), when the Court dismissed the appeal with costs on the ground that the learned judge in the Court below had rightly exercised his discretion in providing that the question as to the existence

(1) See [1914] W. N. 184.

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of the alleged agreement should be first litigated in the presence of the three parties interested, namely, the owners of the *Vanquisher*, the owners of the *Leon Blum*, and the owners of the cargo on board that vessel at the time of the alleged salvage services.

On May 28 two witnesses were examined before the President with reference to the alleged agreement to make no claim for salvage services, and, on June 9, the preliminary point of law was argued as to the validity of the claim of the plaintiffs against the owners of the cargo.

Bateson, K.C., C. Robertson Dunlop, and *H. C. S. Dumas*, for the plaintiffs, the alleged salvors.

Laing, K.C., A. R. Kennedy, and *L. F. C. Darby*, for the defendant owners of cargo, and the owners of the *Leon Blum*.

The arguments of counsel on the question whether the owners of cargo were parties, directly or indirectly, to the alleged agreement fully appear from the following considered judgment:—

July 31. THE PRESIDENT (SIR SAMUEL EVANS). The matter for decision upon this hearing of the point of law is an important one. Shortly stated, the question is: whether, when a vessel carrying cargo is being towed under a towage contract made between the owners of the tug and the owners of the vessel in tow, on the terms of "no cure, no pay, no salvage charges," and when, before the towage has come to an end, the vessel is in danger and salvage services are rendered by the tug to ship and cargo, a claim for such salvage services can be recovered against the owners of the cargo. The towage contract must be more fully stated later.

The question arises in a salvage action originally brought by the owners, master, and crew of the steam tug *Vanquisher* against the owners of the cargo on the *Leon Blum*. In the defence it was pleaded (inter alia) "that the plaintiffs contracted to tow the *Leon Blum* and her cargo from Falmouth to Liverpool for reward upon terms that the plaintiffs should make no claim for salvage reward in respect of any salvage services rendered by their tug to the *Leon Blum* her cargo or freight ; and, further, that "the

owners of the *Leon Blum* in entering into the said towage contract were acting as well for the defendants as for themselves, and by the said towage contract the plaintiffs impliedly contracted with the defendants to make no claim against the defendants for salvage services, and/or the defendants are entitled to the benefit of the said contract, and the defendants object that the plaintiffs cannot maintain this action."

This defence having been delivered, La Société Nouvelle d'Armement, the owners of the vessel, moved the Court to stay all further proceedings in the action, and an order was made, upon certain terms, that the owners of the vessel be added as defendants to the action, and that the action be first heard for argument on the point of law only. Thereupon these added defendants delivered their defence, and pleaded that it was a term and condition of the said towage contract that no claim should be made for salvage reward for any salvage services which might be rendered to the vessel, cargo, or freight. The plaintiffs in their reply traversed this allegation, and pleaded that the first defendants were not parties to the contract, and that they were not entitled to any benefit therefrom.

It is necessary first of all to ascertain the facts before entering upon a consideration of the principles which are applicable. The towage contract is partly in writing and partly printed. It reads as follows :—

"London, Dec. 2, 1913.—To Messrs. Société Nouvelle d'Armement, Nantes.—We beg to confirm arrangement for towage of ship *Leon Blum*, of 2316 tons register, by one tug from Falmouth to Liverpool, including use of tug's hawser, for the sum of 65*l.* (sixty-five pounds). Notice of readiness must be given . . . . days before vessel leaves the docks. The owners do not hold themselves responsible for any damage occurring or occasioned by vessels while in tow of steam tug. For the Elliott Steam Tug Co., Ltd., (signed) Jno. Page, Jun. See conditions on other side."

On the other side, as indicated, various conditions are set out in print. Fifteen lines of the printed form usually adopted by the tug owners, commencing "The acceptance, &c.," and ending "total loss," were deleted. The deletion was made pursuant to

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an arrangement made in the previous months of June and July, which was to be applicable to towing contracts generally between the tug owners and these shipowners. The arrangement was the result of correspondence, which was produced in evidence, and an interview had between M. Jouteau and Mr. Page, jun., on July 17, 1913. The result of the interview is embodied in a letter dated July 17, 1913, which reads as follows:—

"Messrs. Société Nouvelle d'Armement, Nantes.—Dear Sirs,—We have to-day had the pleasure of a visit from Mons. Jouteau and we confirm the verbal arrangement which we came to, whereby it is agreed whenever our tugs are engaged to tow any of your vessels, whether the contract be made by your good selves or by one of your masters, it shall be on the basis of 'No cure no pay; no salvage charges.' Trusting this may lead to a good business between the two companies. Yours faithfully, for the Elliott Steam Tug Co., Ltd., (signed) Jno. Page, Jun."

Verbal evidence of this interview was given by the persons referred to. In my view the result did not, and ought not to be taken to, modify the contract further than is stated in the letter of July 17, 1913.

The contract which was entered into with reference to the *Leon Blum* I find is that contained in the document of December 2 already referred to, with the addition to the contract of the words "no cure, no pay; no salvage charges," or, as I prefer to put it, the contract for towing the *Leon Blum* was that contained in the said document, with the collateral contract embodied in the words "no cure, no pay; no salvage charges."

The parties to the contract were the tug owners and the shipowners, and no others. The shipowners acted only for themselves, and not as agents for the owners of the cargo. The ships of the shipowners which were towed by the tug owners were often, and apparently generally, in ballast. At any rate, there was no reference to the *Leon Blum* carrying any cargo in the negotiations leading up to the contract of December 2, 1913; and there was no evidence and no suggestion that the tug owners were aware that the vessel was laden with cargo. Further, the cargo owners had no knowledge of the terms of the contract or collateral contract. Again, there was no evidence, or

suggestion, that the shipowners in entering into the contract or at any time gave any intimation to the cargo owners that the business of the shipowners was carried on, or that their freights were charged, upon the basis that in cases of towage they had provided for "no cure, no pay; no salvage charges."

For the purposes of this argument it is admitted that before the towage was completed the tug *Vanquisher*, her master and crew, rendered salvage services to the vessel, cargo and freight in respect of which, apart from any towage contract, they would be entitled to salvage remuneration.

What are the legal principles to be applied to these facts? In order to clear the ground, I note that counsel for the cargo owners did not contend (or, if at one time they appeared to do so, they gave up the contention) that the contract was entered into by the tug owners as agents on behalf of the cargo owners in any sense; but they did put forward the contention that the contract with the shipowners nevertheless enured for the benefit of the cargo; and that under the contract the tug owner had to transport the ship, and its contents, the cargo, without any claim for salvage against either cargo or ship. They also argued that the shipowners were bailees of the cargo, and were therefore entitled either to contract for the cargo owners, or for themselves for the carriage of the cargo. No evidence was given as to the contract of carriage between the shipowners and the cargo owners.

If the services for which remuneration is claimed were rendered to the cargo in the process of the execution of the towage contract, and while the tug was towing the ship under the contract, there could not, in my opinion, be any valid claim for salvage remuneration against the cargo owners. Voluntariness is of the very essence of salvage services. In *The Neptune* (1) Lord Stowell said: "What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship"; and Kennedy L.J., in his work on Salvage (2), describes a service

(1) (1824) 1 Hagg. Adm. 227, at p. 236. (2) (1907) 2nd ed., p. 2.

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as a salvage service "if and so far as the rendering of such service is voluntary, and attributable neither to legal obligation, nor to the interest of self-preservation, nor to the stress of official duty."

The services in respect of which the claim is now made were, ex concessis, salvage services; but they were rendered in the course of events which occurred at a time when the tug was towing under the towage contract. Can they be separated from what was done in pursuance and performance of the obligations of the tug under the contract? If they cannot, then no salvage can be recovered against the cargo (cf. *The Solway Prince* (1)). If they can, and if they are services outside and beyond those required under the contract, salvage is recoverable: *The Sappho*. (2)

What are the obligations of a tug towards the tow under a towage contract? Tugs which have been engaged to tow have certain duties, to remain by the tow in circumstances of danger, and to render such assistance as they can, or perhaps such as it would be fair and reasonable to expect them to render without running undue risks to themselves and their crew. Apart from such duties arising from the contract they would have others of a moral kind, which must be distinguished from the former. Thus the duties of tugs may be only of such a character as are common to all honest seafaring persons, apart from any legal obligations; such moral duties as were in the mind of Lord Stowell, when he said: "It is the duty of all ships to give succour to others in distress; none but a freebooter would withhold it" (vide *The Waterloo* (3)), or they may be such duties as are obligatory by law on persons who have contracted to tow. The line between these may be difficult to draw, and the use of the word "duties" as common to both classes must not be allowed to confuse them. As to the duties of the legal kind, the language employed in the decisions seems to raise some difficulties and to cause some perplexity. It is necessary to examine these decisions, and the language used in the judgments, with some particularity.

(1) [1896] P. 120. (2) (1871) L. R. 3 P. C. 690.
(3) (1820) 2 Dods. 433, at p. 437.

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In the well-known and leading case of *The Minnehaha* (1) Lord Kingsdown in the Privy Council speaks of the "supersession" of the towage contract; of its being "implied in the contract that the tug shall be paid at such higher rate"; and of the towage contract "being so far suspended as to entitle her to a larger remuneration." See the following passages per Lord Kingsdown at p. 347:—

"If in the discharge of this task, by sudden violence of wind or waves or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage. Whether this larger remuneration is to be considered as in addition to, or in substitution for, the price of towage, is of little consequence practically. The measure of the sum to be allowed as salvage would, of course, be increased or diminished according as the price of towage was or was not included in it. In the cases on this subject the towage contract is generally spoken of as superseded by the right to salvage."

And at pp. 347-348: "The tug is relieved from the performance of her contract by the impossibility of performing it; but, if the performance of it be possible, but in the course of it the ship in her charge is exposed, by unavoidable accident, to dangers which require from the tug services of a different class and bearing a higher rate of payment, it is held to be *implied in the contract* that she shall be paid at such higher rate. To hold, on the one hand, that a tug, having contracted to tow, is bound, whatever happens after the contract, though not in the contemplation of the parties, and, at all hazards to herself, to take the ship to her destination; or, on the other, that the moment the performance of the contract is interrupted, or its completion in the mode originally intended becomes impossible, the tug is relieved from all further duty, and at liberty to abandon the ship in her charge to her fate, would be alike inconsistent with the public interests. The rule as it is established guards against both inconveniences,

(1) (1861) Lush. 335.

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and provides at the same time for the safety of the ship, and the just remuneration of the tug. The rule has been long settled; parties enter into towage contracts on the faith of it; and we should be extremely sorry that any doubt should be supposed to exist upon it."

And at p. 353: "We are satisfied that the breaking of the ship's hawser placed the ship in danger; that when she drifted over the shoal, ... and as long as she lay there, such danger continued; that she was rescued from such danger by the exertions of the steam tugs; that as to the *United Kingdom* the towage contract was so far suspended as to entitle her to a larger remuneration under the head of salvage."

When *The Minnehaha* (1) came before Dr. Lushington in the Admiralty Court, he spoke of the towage agreement being "vacated" when superior danger and service superior to towing supervened. In *The Annapolis* (2), decided in the Privy Council on the same day as *The Minnehaha* (1), Lord Kingsdown says (at p. 373): "She (the tug) was justified in looking to her own safety in the first instance, but that consideration did not exonerate her from the obligation of following the vessel (the *Annapolis*) in tow to complete her engagement, and from doing what she could to prevent the mischief which might arise from the temporary interruption of her service."

When the same case was in the Court of Admiralty Dr. Lushington said (3):—

"A contract for mere towing does not include the rendering of any salvage service whatever. If it happens, by reason of unforeseen occurrences in the performance of the contract to tow, that new and special services are necessary, the contract is not at once rendered void, nor is the tug at liberty to abandon the vessel, for that would be most detrimental; nor, on the other hand, is the tug bound to perform the new service for the stipulated reward agreed for the original service; but the law requires performance of the service, and allows salvage reward. There is no such thing as salvage on land; and we must look at things done on the sea with a very different eye to those which are done

(1) Lush. 335, at p. 341. (2) (1861) Lush. 355.
(3) Lush. at p. 361.

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on the land. It was therefore the duty of the tug, after the collision took place, to render every sort of assistance she could to the vessel in order to rescue her from the danger immediately arising in consequence of the collision."

Shortly before delivering this judgment, Dr. Lushington decided the case of *The Saratoga* (1), and there expressed himself (at p. 321) as follows:—

"The law I have laid down in more than one instance upon this point is, that if, in the performance of a contract of towage, an unforeseen and extraordinary peril arise to the vessel towed, the steamer is not at liberty to abandon the vessel, but is bound to render to her the necessary assistance; and thereupon is entitled to salvage reward. I am of opinion that these rights and obligations incident to a contract of towage are implied by law, and that the law thereby secures equity to both parties, and the true interests of the owners of ships."

In 1866, in *The White Star* (2), Dr. Lushington again dealt with this subject, and in the course of his judgment said:—

"The question is, whether the agreement (i.e., the towing contract) was rendered invalid by anything which afterwards happened. No doubt the principles laid down by the Judicial Committee of the Privy Council in *The Minnehaha* (3) are the true ones, and those which I have endeavoured to act upon for nearly thirty years. When I first came to the Bench, I found considerable difficulty in determining whether a vessel engaged to tow another was *bound*, notwithstanding change of weather, to adhere to her, and perform services—not the service she originally engaged for, but a service which happened by accident to be superadded; and the doctrine I then held was, that she was bound to adhere to the vessel, and do all in her power to rescue her from danger, and she was to receive something additional, and not merely the remuneration originally agreed upon. . . . . the contract must be adhered to, and is not to be broken hastily, unless it be shown that circumstances have occurred which could not have been within the contemplation of the parties, and that such is the state of circumstances, that

(1) (1861) Lush. 318. (2) (1866) L. R. 1 A. & E. 68.
(3) Lush. 335.

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to insist upon the contract and hold it binding, would be contrary to all principles of justice and equity. It would be utterly impossible to define all such circumstances, but I think we should never have any doubt in saying in any particular case what they were which would give a right to abandon the contract."

Sir Robert Phillimore, in *The I. C. Potter* (1), speaks of the supervening circumstances justifying the tug in "abandoning" her contract. The following are his words (2): "It is not disputed that circumstances may supervene which engraft upon an original towage agreement the character of a salvage service; and to this proposition of law I must add another, which has an important bearing on my decision, namely, that when the supervening circumstances, from stress of weather or otherwise, are such as to justify the towing vessel in abandoning her contract, it is still her duty to remain by the towed vessel for the purpose of rendering her assistance, but that for such assistance she is entitled to salvage reward." And at p. 298: "Counsel for the ship have contended that the principle underlying all the cases in which salvage services have been engrafted upon a towing engagement has been that the new service was of a different class, and the original service interrupted; and it is urged that in this case the service was not of a different class, but remained towage, and was not interrupted, as by the breaking of a hawser or other circumstances. But I cannot assent to this opinion. I think the true criterion by which it is to be ascertained, whether the towing vessel has become a salvor, is whether the supervening circumstances were such as to justify her in abandoning her contract."

In the case of *The Five Steel Barges* (3) Sir James Hannen stated his conclusion from an examination of the authorities thus: "Whether or not, as a matter of fact, the services which were rendered by the tug were of such a character, and were rendered under such circumstances, as to take them out of the towage contract. From the examination I have given to the decisions in point, it appears to me that it is not necessary, in

(1) (1870) L. R. 3 A. & E. 292. (2) Ibid. at p. 297.

(3) (1890) 15 P. D. 142.

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order to become entitled to salvage, that the supervening danger should be of such a character as to actually put an end to the towage contract. It is sufficient if the services rendered are beyond what can be reasonably supposed to have been contemplated by the parties entering into such a contract. It depends on the circumstances of each case whether or not the services are advanced in this way to a higher degree, so as to establish a right to salvage. . . . . The character of the contract is, of course, to be looked at, and the circumstances to which it related, before we arrive at the point from which we have to start in estimating the value of the higher class of services."

I will only cite one other judgment, which was delivered by Sir Gorell Barnes. It is not in the Law Reports, and the language accordingly was not revised, but it has the ring of an accurate transcription. It was in the case of *The Thalatta*, reported in the *Shipping Gazette* on May 26, 1905 :—

" The law is perfectly well known. A tug is entitled to recover salvage if the services are outside the scope of the contract, but at the same time the fact that there is a contract cannot be left out of consideration altogether, because the vessel is entitled to have the assistance of the tug ; in other words, the tug cannot desert the vessel. So the tug is liable to render some assistance when the services cease to be salvage."

I have now cited the chief authorities upon the subject. The right conclusion to draw from the authorities, I think, is that where salvage services (which must be voluntary) supervene upon towage services (which are under contract) the two kinds of services cannot co-exist during the same space of time. There must be a moment when the towage service ceases and the salvage service begins ; and, if the tug remains at her post of duty, there may come a moment when the special and unexpected danger is over, and then the salvage service would end, and the towage service would be resumed. These moments of time may be difficult to fix, but have to be, and are, fixed in practice. During the intervening time the towage contract, in so far as the actual work of towing is concerned, is suspended. I prefer the word " suspended " to some of the other words which have been used, such as " superseded," " vacated," " abandoned," &c. If this

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conclusion be correct, then it follows, from the concession made in this case, that salvage services were rendered, that the work of which those services consisted was not done under the towage contract.

It also follows, in my opinion, that although the tug owners have, by the collateral agreement referred to, agreed not to make any salvage charges against the ship and freight, they are not precluded from claiming and recovering salvage remuneration in respect of the cargo against the cargo owners who were not in any way parties to the towage contract. This argument might be enforced, and the fallacy of the argument that there could be no salvage of the cargo because what was done was done to the ship in which it lay might be shown, by an illustration: Assume that the cargo had been jettisoned, and, while still in the sea, had been salved by the tug, could it be said that no salvage would be payable by its owners? Could an agreement not to claim salvage against the shipowners—the other parties to the contract—absolve the owners of the jettisoned cargo, salved in the case supposed, from liability to remunerate the salvors?

The conclusion above stated appears to me to be in harmony with the general policy of our law in regard to salvage services. It has been said with authority that "Salvage is a mixed question of private right and public policy." For obvious reasons of public policy, salvors are looked upon with favour and are encouraged by our maritime law; and the whole history of the subject, and the authorities, attest that a clear case must be made out before salvors can be deprived of remuneration for salvage services.

There are also other aspects of this case to which I think it well to advert.

It has been argued that the shipowners could make a contract as to salvage with the tug owners by which the cargo owners would be entitled to benefit, although the shipowners did not purport to act, and were in no sense acting, as agents for the cargo owners. So far as liability is concerned, it has been held that in regard to the owners of the cargo on board a salved ship neither the owners of the ship, nor the master, have authority to bind the cargo or its owners by any salvage contract:

Anderson v. *Ocean Steamship Co.* (1) If the cargo owners would not be bound, can it be said that the other party, namely, the tug owners, are bound? Are the cargo owners to have the benefit, and not to be subject to the obligations, of such a contract?

There is another difficulty in the way of the defence of the shipowners and cargo owners to some parts of the plaintiffs' claim. The claim in the action is made not only by the tug owners who entered into the towage contract, but also by the master and crew of the tug. There is no evidence whatever that the agreement, "no salvage charges," was entered into by the tug owners with the assent or knowledge of the master or crew. It is clear that the owners, in the circumstances in which such an agreement was made (namely, in anticipation of future contracts of towage of the defendants' ships), had no authority to bind the master and crew by any agreement fixing the amount of salvage; certainly not by an agreement depriving them of salvage remuneration altogether: *The Margery.* (2) In any event, therefore, the master and crew are entitled to recover salvage from the cargo owners, and although it is not necessary to decide it, I do not see that there is any good answer in law to a claim by them against the ship and freight. It has been settled that the master and crew of a salving ship may recover salvage against cargo, although the owners of the salving ship, by reason of their relation to the salved ship or cargo, may not: *The Agamemnon* (3), *The Sappho* (4), and *The Glenfruin.* (5)

There is a still further point with regard to the rights of the crew. Seamen—always the favourites of the Legislature—have protection under the Merchant Shipping Act, 1894. In accordance with the policy of the law in casting its protection over seamen, and stimulating them to put forth efforts and to face risks to save life and property, s. 156 provides, as to salvage, as follows: "(1.) A seaman shall not . . . . by any agreement abandon any right that he may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent

(1) (1884) 10 App. Cas. 107.
(2) [1902] P. 157.
(3) (1883) 5 Asp. M. L. C. 92.
(4) (1871) L. R. 3 P. C. 690.
(5) (1885) 10 P. D. 103.

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with any provision of this Act shall be void." Therefore, even if the seamen had been persuaded to join in the agreement by which it is said they abandoned, or precluded themselves from claiming, salvage reward, such an agreement would be wholly inoperative. On this ground also the seamen have a right to salvage against the cargo owners.

I am accordingly of opinion that upon the preliminary point of law as to the validity of the claims of the plaintiffs against the owners of the cargo for salvage services rendered (if any) in respect of the cargo, the plaintiffs succeed and the defendants fail.

The amount of the salvage remuneration would, of course, be in proportion to the value of the salved cargo when compared with the value of the ship, freight, and cargo.

I order the defendants to pay to the plaintiffs the costs of and incidental to the motion to add the second defendants, and of and incidental to the addition of the defendants, and to the hearing of the point of law.

Leave to appeal.

Solicitors for the plaintiffs, the owners, master, and crew of the tug *Vanquisher: Thomas Cooper & Co.*

Solicitors for the defendants, the owners of cargo lately laden on board the *Leon Blum*, and the owners of the *Leon Blum: Pritchard & Sons, for Simpson, North, Harley & Co., Liverpool.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1915
March 13.

HALL *v.* HALL.

Divorce—Maintenance—Petition for Reduction—Consent Order—Power to vary —Matrimonial Causes Act, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, sub-s. 2 (*a*).

A wife upon whose petition for divorce a decree absolute had been made obtained an order for permanent maintenance against the husband, a retired Army officer, at the rate of 120*l.* per annum. The order was expressed to be made by consent, the maintenance to be paid "out of his present income and until further order." At the date of the order his only income was derived from his pension of 420*l.* per annum. He was afterwards obliged to commute a portion of his pension in order to pay the costs of the petition and to meet the expenses of illness from which he suffered. His income was thus reduced to 320*l.* per annum. The wife had since the order carried on a business which yielded her an income.

Upon a petition by the husband for reduction of the maintenance:—

Held, that notwithstanding the order was by consent and that the husband's reduction of income was brought about by his own act the Court had power under s. 1, sub-s. 2 (*a*) of the Matrimonial Causes Act, 1907, to modify the order, and in so doing ought to have regard to all the circumstances of the case, including both the reduction in the husband's income and the increase in that of the wife.

Appeal from an order of Bargrave Deane J.

Upon the wife's petition for divorce a decree absolute was made on February 5, 1906. On February 26, 1906, the following order for maintenance was made by Gorell Barnes P.:—"Upon hearing the solicitors for the parties and by consent I do order that the respondent do out of his present income and until further order of this Court pay or cause to be paid to the petitioner maintenance at and after the rate of 120*l.* per annum and to be payable in equal monthly instalments of 10*l.*" At the date of this order the respondent's income was 420*l.* a year which he derived from his pension as a retired colonel in the Army.

On March 27, 1914, the respondent filed a petition for reduction of maintenance on the ground that his income had been reduced from 420*l.* to 320*l.* and that the wife's had increased since the date of the order for maintenance. He alleged that

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since the date of the order his income had diminished and he was unable to continue to make the monthly payments; that his sole source of income was his Army pension; and that since the date of the order he had been compelled to commute 100*l.* of the pension to enable him to meet certain expenses, so that his income was now only 320*l.* a year. He had been obliged to commute his pension to that extent for the purpose of paying off certain debts incurred by him in consequence of his having to find heavy sums for costs and to meet the necessary expenses of various illnesses from which he had suffered. It appeared that the wife had since the date of the order for maintenance carried on the business of a boarding-house keeper from which she derived an income.

The petition for reduction was referred for inquiry to the registrar, who took the view that the order having been made by consent the Court had no power to order a reduction, and he reported that the petition should be dismissed.

On December 2, 1914, Bargrave Deane J. confirmed the registrar's report and dismissed the petition.

The husband appealed.

W. O. Willis, for the appellant. The judge was wrong in holding that he had no power to order a reduction, the original order having been made by consent. Under the Matrimonial Causes Act, 1907 (7 Edw. 7, c. 12), s. 1, sub-s. 2 (*a*), the Court has power if the husband "from any cause" becomes unable to make the payments ordered for maintenance "to discharge or modify the order or temporarily to suspend the same as to the whole or any part of the money so ordered to be paid." Those words are very wide. The original order was made under the Matrimonial Causes Act, 1866, s. 1. That was repealed by the Act of 1907, under which the application for reduction is made. The fact that the amount of maintenance to be paid was agreed is immaterial, and does not affect the power of the Court to order a reduction where there has been a change of circumstances.

Le Bas, for the wife. The diminution of the husband's income was brought about by his own act. The wife ought not

to be compelled in this way to pay part of his debts: *Neil* v. *Neil.* (1)

The fact that the wife's income is now larger than it was when the order was made will not be considered by the Court: *Sharpe* v. *Sharpe.* (2)

LORD COZENS-HARDY M.R. (after stating the facts and reading the order for maintenance). On the face of that order, although it is quite true that the figure of 120*l.* was agreed, it is clear that it was only "until further order" that the 120*l.* a year was to be paid out of the husband's then present income. It seems to me quite impossible to suggest, and counsel for the wife has not contended, that that was an order which it was not competent for the Court if it thought fit to vary. The husband in 1914 presented a petition to reduce the amount payable under the order. His case was this. His income, which was derived from a Government pension, had been reduced because he had been obliged to commute part of his pension. He did that partly because he was not otherwise able to pay the costs which he was ordered to pay to his wife, and partly because he had serious illnesses and had no other course but to encroach on his pension. The commutation can only be made by consent of the Government department, who must be satisfied that there is good reason for it. Further than that, the husband says his wife has now a separate income of her own and is much better off than she was.

The petition was referred to the registrar, who reported as follows: "The ground of the application is that the present petitioner's income has been reduced from 420*l.* per annum to 320*l.* and the respondent's has increased since the date of the order. The reduction of income is due to the applicant having commuted a portion of his pension for the purpose of paying off certain debts. Having regard to this and the fact that the original order was made by consent it is submitted that the Court has no power to order a reduction of maintenance, and that this petition should be dismissed." That is to say that it is not competent for the Court to vary the order

(1) (1832) 4 Hagg. Eccl. 273. (2) [1909] P. 20.

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for two reasons, first, that the order was made by consent, and secondly, that the husband has reduced his income by his own act.

That report came before Bargrave Deane J., who confirmed it, and from his order confirming the report there is an appeal to this Court.

I think it would be lamentable if it were laid down as a hard and fast rule of law that it is not competent for the Court to consider as a ground for reduction of maintenance in circumstances like the present the fact that the husband has been obliged by his own act to reduce the amount of his pension. Suppose the husband were obliged to undergo a serious operation for appendicitis and the only way of obtaining skilled services was by commuting his pension. Could it be reasonably contended that that reduction would be a circumstance which ought not to be taken into consideration having regard to the express words of s. 1, sub-s. 2 (*a*), of the Act of 1907, which provides: [The Master of the Rolls read the sub-section and continued:] I have not the smallest doubt that the registrar is wrong in saying that it is not competent to the Court to vary this order. To say that the Court has no power to do so is altogether wrong, and the order must be reversed.

There is another point which seems to me to require very careful consideration. It is alleged, but not proved, because the matter was not gone into, that the wife is now in a position in which she has considerable means of her own, and the husband says that this is a circumstance which ought to be taken into account. Again I will take a case which illustrates the proposition. Suppose the wife had, under the will of a relative, now become entitled to an income of 1000*l.* a year. Is it possible to say that the Court would not be entitled to have regard to the fact that the wife's income was very much in excess of what it was? I do not desire to say that any of these circumstances are conclusive, but I do say that they require the consideration of the Court, and that it is obligatory on the Court to have regard to all the circumstances both of the husband and of the wife.

With regard to this second point the only authority that has

been referred to is the case of *Sharpe* v. *Sharpe* (1), which came before Bargrave Deane J. That was not a decision on the point but merely a dictum of the learned judge. It was not a case where the original order was made, as here, "until further order." When an application is made for revision and when the original order has been made "until further order" it seems to me that the Court ought to have regard to all the circumstances of the case in the same manner as if those circumstances had existed at the date of the original order. For these reasons I think that unless the parties can agree to a reduction of the maintenance the matter must go back to the registrar for further inquiry. The appeal must therefore be allowed.

PHILLIMORE L.J. I am of the same opinion. I understand the registrar's report to mean this: "I cannot grant any variation on two grounds: first, because the original order was made by consent; and secondly, because it was the act of the husband which led to the reduction of income." The first of these grounds goes altogether, because it is admitted that, although the order was made by consent, the Court is able to vary it seeing that it was only made "until further order." As regards the second ground it must mean this: that inasmuch as the reduction was the act of the husband the Court will not look behind that to see what it was that caused him to commute his pension. The registrar also seems to have thought it was immaterial that the wife might have now got an income of her own. As regards the second ground the registrar, with respect, was wrong. The only case which Mr. Le Bas has cited is *Neil* v. *Neil* (2), which has nothing to do with the present case as that decision was based on the ground that the husband's reduction of income was caused by speculation. The case is quite different where, for instance, the husband has to suffer an operation. After all the wife's whole maintenance depends on the husband living. If he has to have an operation he perhaps either pays for it and is cured and his life is prolonged, or goes without it and dies, and the wife's maintenance ceases. With regard to the costs of the divorce proceedings I do not see why

(1) [1909] P. 20. (2) 4 Hagg. Eccl. 273.

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they should not be taken into account unless they were outrageously incurred. Ordinary costs might be a reason for allowing a commutation in respect of them. At any rate these matters should be considered. Now with regard to the wife's alleged income I do not wish to criticize what was said by Bargrave Deane J., obiter, in *Sharpe* v. *Sharpe*. (1) It may be that the language of the statute is not so expressed as to enable the Court to make an alteration, but the statute does not tie the hands of the Court when they were free before, and this order, which is evidently in the common form, very wisely and properly allows the Court to reconsider not only the position of the husband but the relative positions of the husband and wife with regard to their property; and as the Master of the Rolls has just said, it would be very proper for the registrar to consider not only the descending scale of the husband's income, but the ascending scale of the wife's, and to make an order accordingly.

JOYCE J. I agree.

Appeal allowed.

Solicitors: *Burton, Yeates & Hart; Valpy, Peckham & Chaplin.*

(1) [1909] P. 20.

G. A. S.

THE ELLA.

[1913 Folio 302.]

1914

May 26.

Admiralty—Ship — Collision — Barge sunk by Negligence of Steamship—Abandonment of Wreck—Action by Harbour Board against Owners of Steamship—Obstruction to Navigation—Nuisance—Expense of removing Wreckage—Harbours, Docks and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 56—*Southampton Harbour Act*, 1863 (26 & 27 *Vict. c. cxix.*), *ss.* 32, 49.

Through the negligence of the defendants' servants a collision occurred in the port of Southampton between the defendants' steamship and a barge, with the result that the barge sank. The owners and underwriters of the barge having abandoned her, the statutory harbour authority incurred expenses in lighting and buoying the wreck and subsequently removing the obstruction by blowing it up. In an action brought by the harbour authority against the owners of the steamship to recover the expenses so incurred:—

Held by the President (Sir Samuel Evans), that the defendants (the owners of the steamship) were liable to make good to the plaintiffs (the harbour authority) the expenses incurred by them whether the case was regarded from the point of view of the breach of duty or negligence of the defendants or from that of a public nuisance caused through their fault.

Action by Harbour Board.

The plaintiffs were the harbour authority for the port of Southampton, incorporated under the Southampton Harbour Acts, 1863 to 1911.

The defendants were the London and South Western Railway Company, owners of the steamship *Ella*.

The case raised the question as to the liability of the owners of a vessel which had negligently come into collision with and sank another vessel for the expenses incurred by the harbour authority in the lighting, &c., and subsequent dispersal of the wreckage.

By their writ of summons, dated June 19, 1913, the plaintiffs, the Southampton Harbour Board, claimed against the defendants "the expenses incurred by the plaintiffs in and about the lighting, buoying, removal and destruction of the barge *Rosina* which was sunk in the plaintiffs' harbour by the negligence of the defendants or their servants in the month of June, 1912"; and, by their

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statement of claim, as amended at the hearing, the plaintiffs alleged that they were the harbour authority for the port of Southampton, and that the defendants were the owners of the steamship *Ella*, and that the plaintiffs had suffered damage by reason of the acts and/or defaults of the defendants or their servants. By paragraph 2 the plaintiffs alleged that "at about 11.45 P.M. on June 18, 1912, the *Ella*, while navigating in the deep water channel within the said port about off Netley Hospital, came into collision with the hopper barge *Rosina* with the result that the *Rosina* sank immediately, and the defendants thereby caused an obstruction in the fairway of the channel which constituted a nuisance."

By paragraph 3 the plaintiffs alleged that "the said collision and sinking were caused by the negligent navigation of the *Ella* by the defendants or their servants" in that those on board the *Ella* neglected to keep a good look-out, to keep out of the way of the *Rosina*, to ease, stop, or reverse the engines, and to comply with arts. 23, 24, and 29 of the regulations for preventing collisions at sea.

Paragraph 4. "By reason of the premises it became and was necessary for the plaintiffs to light, buoy, mark and disperse the said wreck of the *Rosina* and the plaintiffs have thereby incurred expenses in the abatement of the said nuisance."

By their defence the defendants admitted that a collision took place between the *Ella* and the *Rosina* at the time and place alleged in the statement of claim with the result that the *Rosina* sank immediately. They admitted that the collision and sinking were caused by the improper navigation of the *Ella* by a servant or servants of the defendants. They admitted that so long as the *Rosina* lay where she sank she was in such a position as to cause obstruction to navigation, but they did not admit that the wreck of the *Rosina* where she lay constituted a nuisance or that such nuisance, if any, was caused by themselves or their servants, or that the plaintiffs were interfered with in the exercise of any right or otherwise injured thereby, or that the plaintiffs suffered any special damage by reason hereof. By paragraph 3 the defendants denied "that it became or was necessary for the plaintiffs to light, buoy, mark or disperse

the wreck of the *Rosina*," and denied that the plaintiffs had thereby incurred expenses, and by paragraph 4 alleged that "there was no breach of duty towards the plaintiffs by the defendants," and by paragraph 5 alleged that the statement of claim disclosed "no cause of action against the defendants."

1913. Dec. 10, 11. *Sir R. B. D. Acland, K.C.*, and *H. C. S. Dumas*, for the plaintiffs, the Southampton Harbour Board. In this action it is sought to make the defendants repay to the plaintiffs the expenses to which they have been put, the short ground of the claim being that they, the defendants, are in the position at common law of wrong-doers who have put a third party under the necessity of having to pay money.

The defendants were under a duty to navigate their vessel so as not to cause an obstruction in the harbour; but they admit that the collision between their vessel, the *Ella*, and the barge *Rosina* and the sinking of the *Rosina* were caused by the improper navigation of the *Ella* by the defendants' servants, and the defendants further admit that so long as the *Rosina* lay where she sank she was in such a position as to cause obstruction to navigation. In those circumstances at common law a nuisance was created whether the defendants intended it or not; see *Rex* v. *Moore* (1); and as the owners and underwriters of the barge had abandoned her, it became the duty of the plaintiffs, as the statutory authority, acting under their statutory powers, to remove or disperse the wreck. They accordingly proceeded in the first instance to light, buoy, and mark the position of the barge, and subsequently to remove the wreckage by destruction with explosives. This entailed expense and involved the plaintiffs in special damage for which they are entitled to recover, as they are a statutory body under a legal obligation to keep their highway free from obstruction, and have incurred expense in carrying out that which they were obliged to do: see *Winterbottom* v. *Lord Derby* (2); *Julius* v. *Bishop of Oxford* (3); also the cases mentioned in the judgment of the President: *Dormont* v.

(1) (1832) 3 B. & Ad. 184.
(2) (1867) L. R. 2 Ex. 316, at p. 322.
(3) (1880) 5 App. Cas. 214.

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Furness Ry. Co. (1); *Louth District Council* v. *West* (2); and *Mersey Docks Trustees* v. *Gibbs.* (3)

Leslie Scott, K.C., and *R. H. Balloch*, for the defendants, the owners of the *Ella*. It is submitted that the plaintiffs cannot by this action recover from the defendants the expenses incurred in lighting, buoying, and ultimately destroying the wreck of the barge *Rosina*, and the common law liability suggested by the plaintiffs does not derive support from any case or Act of Parliament. It is true that by s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, incorporated in their Acts, and explained in *Barraclough* v. *Brown* (4), the plaintiffs have the power of removing wrecks in the harbour, and the expenses so incurred may be recovered from the owner; but the defendants, the owners of the *Ella*, were not the owners of the barge *Rosina*, and cannot be substituted for them. It also seems clear that the right, under s. 32, et seq. of the Southampton Harbour Act, 1863 (26 & 27 Vict. c. cxix.), to receive dues (see Sched. B), duties, and tolls in respect of vessels using the harbour is qualified, as well by the common law as by s. 49 of the same Act imposing upon the plaintiffs the duty of removing obstructions to safe navigation, and for this purpose they must apply such portion of their revenues as may be required. Further, assuming that the obstruction was a public nuisance they cannot abate it at the expense of the defendants, as the plaintiffs did not suffer any special damage. As to particular damage being necessary on which to found a claim, see *Rose v. Miles.* (5)

As to the question of negligence, the defendants did not owe any duty to the plaintiffs: see the remarks of Lawrence J. in *Scriven Brothers & Co.* v. *Hindley & Co.* (6), of Bowen L.J. in *Thomas* v. *Quartermaine* (7), and the case of *Metropolitan Ry. Co.* v. *Jackson* (8); and with respect to the remedy for an alleged breach by the defendants of the obligation of good seamanship, it must be remembered that when a duty is created with the object of preventing a mischief of a particular kind, a person

(1) (1883) 11 Q. B. D. 496, per Kay J. at p. 502.
(2) (1896) 65 L. J. (Q.B.) 535.
(3) (1866) L. R. 1 H. L. 93.
(4) [1897] A. C. 615.
(5) (1815) 4 M. & S. 101.
(6) [1913] 3 K. B. 564.
(7) (1887) 18 Q. B. D. 685, at p. 694.
(8) (1877) 3 App. Cas. 193.

who, by reason of the defendants' neglect of that duty, suffers a loss of a different kind is not entitled to maintain an action in respect of such loss, see *Gorris* v. *Scott.* (1)

Here the damage is too remote, and there is an intervening cause, namely, the volitional act of abandonment of the barge by her owners which prevented those owners being sued for the expenses: see *Sharp* v. *Powell* (2); and the expenses of removal fall upon the "owner": *Eglinton* v. *Norman.* (3) Here there was no obligation upon the owner to raise the abandoned barge: see *The Utopia.* (4) In the case of *The Snark* (5) the liability of the defendants was based upon the fact that they were the owners and remained in possession.

In respect of nuisance no action can be brought unless the plaintiff has by it been interrupted in the exercise of a right and by that interruption has suffered damage: see *Bagshaw* v. *Buxton Board of Health* (6); see also *Reynolds* v. *Urban District Council of Presteign.* (7) As to the sanction of the Attorney-General being necessary, see *Wallasey Local Board* v. *Gracey* (8) and *Tottenham Urban Council* v. *Williamson.* (9) As to the general powers in respect of the removal of wrecks by a harbour or conservancy authority, and reimbursing themselves for expenses incurred out of the proceeds of the sale of the property only, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 530, and as to the limitation on the power of enforcement by action, see *Pasmore* v. *Oswaldtwistle Urban District Council.* (10)

[Reference was made to *Lodge Holes Colliery Co.* v. *Wednesbury Corporation* (11), and to the following cases mentioned in the judgment of the President: *The Douglas* (12); *The Crystal* (13); *Rex* v. *Watts* (14); and *Brown* v. *Mallett.* (15)]

H. C. S. Dumas in reply. The arguments for the defendants have not shown the proposition to be unsound that the person

(1) (1874) L. R. 9 Ex. 125, per Kelly C.B.
(2) (1872) L. R. 7 C. P. 253.
(3) (1877) 3 Asp. M. L. C. 471.
(4) [1893] A. C. 492.
(5) [1900] P. 105.
(6) (1875) 45 L. J. (Ch.) 260.
(7) [1896] 1 Q. B. 604.
(8) (1887) 36 Ch. D. 593.
(9) [1896] 2 Q. B. 353.
(10) [1898] A. C. 387.
(11) [1908] A. C. 323.
(12) (1882) 7 P. D. 151.
(13) [1894] A. C. 508, at p. 516.
(14) (1798) 2 Esp. N. P. C. 675.
(15) (1848) 5 C. B. 599.

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who caused the barge to sink is the person ultimately liable, and if the barge had not been so damaged that it could not be raised, and had not been abandoned, there is no doubt that the cost of removing it could be recovered from the owners, and by them included as part of their claim in an action of damage by collision against the present defendants; the argument on behalf of the defendants would, however, tend to imply that if the damage sustained by the barge is so thorough that the wreck is not worth getting up, then there is no liability; but it is clear from the passage (set out in the judgment of the President) in *The Crystal* (1) (which case is subsequent to *The Utopia* (2)) that Lord Herschell was of opinion that, in such a case as the present, the damage was not too remote, and that a common law action would lie for the expenses of removal.

Cur. adv. vult.

1914. May 26. THE PRESIDENT (SIR SAMUEL EVANS). The facts in this case are not in dispute. The plaintiffs are the statutory harbour authority for the port of Southampton, incorporated and acting under the Southampton Harbour Acts, 1863 to 1911. The defendants are and were at all material times the owners of the steamship *Ella*.

On June 18, 1912, the steamship *Ella* came into collision with and sank a wooden hopper barge loaded with about 250 tons of dredged spoil in the deep-water channel between Fawley Beacon and Dean's Lake buoy, within the port of Southampton. The collision and sinking were caused by the negligent and improper navigation of the steamship *Ella* by the defendants' servants. As the barge lay where she sank she was a danger and obstruction to navigation. The wreck was without delay abandoned by the owners and their underwriters. It was essential for the safe navigation of the channel in which the barge was sunk for the plaintiffs to light, buoy, mark, remove, and disperse the wreck of the barge by blowing it up. This work was carried out by or by the instructions of the plaintiffs, and thereby considerable expenses were incurred.

(1) [1894] A. C. 508, at p. 516. (2) [1893] A. C. 492.

The plaintiffs seek in this action to obtain judgment against the defendants for such expenses, to be assessed on a reference to the registrar and merchants. The defendants contend that such expenses cannot in law be recovered by the plaintiffs against them. Elaborate arguments, and authorities upon many points, were put forward by counsel for the defendants; but in my view the case, regarded in its essential features, is fairly simple.

The Harbour Board have power from time to time to keep open the channels in the Southampton Water, and to remove all obstructions within the port and harbour, and to do all such things as may be requisite for effecting any such purpose (s. 26 of the 1863 Act). By the incorporation of the Harbours, Docks and Piers Clauses Act, 1847, they also have the powers conferred by s. 56 of that Act for the removal of wrecks or other obstructions in the harbour, and for recovering the expenses thereby incurred from the owner thereof. They are entitled to receive and exact dues, duties, and tolls in respect of vessels using the port and harbour (ss. 32 et seq. of the 1863 Act); and they must apply their revenues from these sources in the prescribed order of priority (inter alia) in keeping open the channels and removing obstructions within the port (s. 49 of the same Act). In these circumstances they not only possess the powers, but I think they have also the duty laid upon them, to remove obstructions and keep the channels in a state fit for safe navigation: *The Douglas* (1); *Dormont* v. *Furness Ry. Co.* (2); *Mersey Docks Trustees* v. *Gibbs.* (3) In my opinion, if it were necessary to decide it, they are under a similar duty under the common law. They owe the duty to all vessels and traders using the harbour for the purposes of navigation; and amongst these are the defendants themselves, who, it was said, pay about 700*l.* annually to the plaintiffs in dues, out of a total of about 19,000*l.* received by them. The defendants also, in my opinion, on their part owed a duty to the plaintiffs as well as to other traders using the harbour to exercise proper care in navigating the *Ella* and not to cause any obstruction or nuisance in the channel.

The common law with reference to obstruction caused by

(1) 7 P. D. 151. (2) 11 Q. B. D. 496.

(3) L. R. 1 H. L. 93.

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wrecks of vessels sunk through misfortune without any fault of their owners is settled by the well-known cases of *Brown* v. *Mallett* (1), *White* v. *Crisp* (2), and *The Crystal* (3); but the question now before the Court is as to the law applicable in cases of obstructions or nuisances in navigable channels caused not through innocent misadventure but by negligent and improper acts. Some guidance, however, is afforded by the cases referred to. In *White* v. *Crisp* (2) the Court of Exchequer adopted the statements of the duties and obligations of the navigators of vessels made by Maule J. in the Common Pleas in *Brown* v. *Mallett.* (1) In the words of Alderson B. in *White* v. *Crisp* (2):—

"This subject was discussed by Mr. Justice Maule in an elaborate judgment in the case of *Brown* v. *Mallett* (1), and from the principles there laid down by him (which, however, were not all absolutely necessary for the decision of that individual case), we do not disagree at all. He there lays it down thus: That it is the duty of a person using a navigable river with a vessel of which he is possessed and has the control and management, to use reasonable skill and care to prevent mischief to others; and he adds that his liability is the same whether his vessel be in motion or stationary, floating or aground, under water or above it. For in all these circumstances the vessel may continue to be in his possession and under his management and control. This duty arises out of the possession and control of the vessel being in him."

In *The Crystal* (3), when dealing with the case of an owner of a wreck sunk through unavoidable accident, and without any negligence or default, Lord Macnaghten approved these two cases, and cited as authoritative from the judgment of Maule J. the following passage:—

"'Where the navigation . . . . has become obstructed by a vessel which has sunk and been lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of

(1) 5 C. B. 599. (2) (1854) 10 Ex. 312.

(3) [1894] A. C. 508.

a public inconvenience, and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. In the case of *Rex* v. *Watts* (1) Lord Kenyon held that the owner of a ship sunk in the Thames by accident and misfortune without his default or misconduct was not liable to an indictment for not removing the obstruction. It was contended for the prosecution in that case that although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might and probably would be greater than any private benefit which the owner might derive from it; and whether it were greater or not, the reason seems to be the same for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered.' Then he adds that in the case of such impediments to navigation arising out of unavoidable accidents, 'the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure,'" and Lord Macnaghten adds the following observations:—

"It seems to me that legislation contravening the principles and reversing the rule laid down by Maule J. would be legislation that might be described, not inaptly, as barbarous. At the same time there would be nothing unreasonable in making the owner, whose private misfortune has caused a public nuisance, pay or contribute to the expense of its removal, if and so far as he derives a private benefit from the operation."

That eminent lawyer, Palles C.B., in the case of *The Edith* (2), dealing with the same matter, said:—

"I need not say that if a vessel is sunk in the harbour or the approaches to the harbour without any default on the part of the

(1) 2 Esp. N. P. C. 675. (2) (1883) 11 L. R. Ir. 270.

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owner of that vessel, at common law he would not be responsible. The liability in such a case of clearing the harbour of the obstruction caused by the sunken vessel would be thrown on the owners of the harbour, who owe a duty to the public of having it reasonably safe for navigation."

The actual decision in *The Edith* (1) was disapproved by the House of Lords, but on a wholly different point. In the same case (p. 277) Fitzgibbon L.J. formulates the question now arising, without expressing any opinion upon it, in these words:—

"I express no opinion on the question whether the Port and Docks Board, if the obstruction was caused by negligence, may not have a common law remedy against those people whose negligence put them to the expense, and make them answerable for their wrongful act."

But in *The Crystal* (2) Lord Herschell seems to me, inferentially, and by necessary inference, to have expressed his opinion on that question in the passage in his speech on p. 516, which runs as follows:—

"Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction or for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of s. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law."

It was contended that the remedies of the plaintiffs were confined to those given by s. 56 of the Harbours, Docks and Piers Clauses Act, 1847. Those remedies are clearly not exhaustive. The clause only deals with the owner of the wreck, and makes him liable, while he remains in law the owner, whether he had been innocent or at fault. It was also suggested that, as the wreck did not belong to the defendants, they could not in any way be made liable for the expenses of its removal. It is difficult to conceive how that can make any difference. It cannot matter

(1) 11 L. R. Ir. 270. (2) [1894] A. C. 508.

whether the defendants' own vessel sank through the negligence of their servants and became an obstruction, or whether another vessel was sunk or some other obstruction was caused through such negligence. It was stoutly contended that the defendants were not liable for negligence as there was no breach of duty on their or their servants' part; further, that if the obstruction was a public nuisance, the plaintiffs could not in law abate it at the expense of the defendants, because they suffered no special damage. Negligent navigation of the defendants' vessel was admitted. This, in my opinion, was a breach of duty towards the plaintiffs, which caused them damage, to be measured by the expenses which they had a right to incur, and which, I think too, they were bound to incur. Moreover, by the fault of the defendants or their servants, a public nuisance was created by the obstruction of the channel, and the expenditure of money by the harbour authority in abating the nuisance, whether pursuant to a right, or in performance of an obligation, constituted special damage: *Louth District Council* v. *West.* (1)

Accordingly, I am of opinion that the defendants are liable to make good to the plaintiffs the expenses incurred by them in buoying, lighting, marking, and subsequently removing the wreck by blowing it up, whether the case is regarded from the point of view of the breach of duty or negligence of the defendants, or from that of a public nuisance caused through their fault.

I desire to add one word more. The abandonment of the wreck was part of the result of the negligence and misconduct of the defendants. The abandonment prevented the plaintiffs from recouping themselves for their expenditure by making the owners repay it. If the owners of the barge had not abandoned it, and had paid, or were under liability to pay, the expense of removing the wreck, under s. 56 of the Harbours, Docks and Piers Clauses Act, 1847, they could, without doubt, have recovered such expense as part of their damages in a collision action against the defendants. Thus the defendants would legally, and quite appropriately, have had to bear these expenses. It is satisfactory, to my mind, that no question of legal formality

(1) 65 L. J. (Q.B.) 535.

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prevents the same result being reached directly in an action by the plaintiffs against the defendants. I give judgment for the plaintiffs for the expenses incurred, and order a reference to the registrar, assisted by merchants, to assess the amount. (1)

Solicitors for plaintiffs, the Southampton Harbour Board: *Braikenridge & Edwards, for Bernard Harfield, Southampton.*

Solicitors for defendants, the London and South Western Railway Company, owners of the steamship *Ella: Clarkson & Co., for William Bishop.*

T. L. M.

1914

Oct. 19.

[DIVISIONAL COURT.]

JOSEPH *v.* JOSEPH.

Husband and Wife—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Desertion—Evidence—Corroboration—Allegation of Marital Intercourse.*

The Court ought not to act upon the uncorroborated evidence of one spouse, alleging marital intercourse at a material date, especially if such evidence is contradicted by the other spouse.

THIS was an appeal by the husband against an order, dated May 7, 1914, of justices sitting at Portsmouth, based upon a finding that the husband had been guilty of desertion.

A previous summons, which had been issued at the wife's instance, had been dismissed; and on that occasion she had sworn the date of desertion as December 16, 1913.

On May 7, 1914, on the hearing of the second summons, the wife gave evidence of marital intercourse since the date of the dismissal of the first summons; but this was denied by the husband.

The justices, nevertheless, found the husband guilty of desertion and made the order now appealed from.

[Some discussion took place as to the absence of any date for

(1) On the application of counsel for the defendants a stay of execution was granted on the usual undertaking with a view to an appeal; but the appeal, although brought and entered, was withdrawn.

the commencement of the desertion, either in the complaints, the summonses, or in the order made upon the second summons. This point was also discussed and dealt with in the reported case of *Fengl* v. *Fengl.* (1)]

Talbot Ponsonby, for the appellant. There is no finding as to when desertion took place; and there is nothing in the order as to the time. The matter was res judicata after the dismissal of the first summons. If the allegation put forward of subsequent marital intercourse was to be acted upon, the justices should have required evidence corroborating the wife, especially in view of the husband's denial. [He cited *Stokes* v. *Stokes* (2); *Blackledge* v. *Blackledge.* (3)]

The respondent did not appear, and no one appeared on her behalf to support the order.

SIR SAMUEL EVANS, PRESIDENT. In this case there is no allegation in the information laid, and therefore no statement in the summons issued thereon as to the date when it is alleged that the desertion took place.

There were two summonses: one dated January 12, 1914, and the other preceded by a separate information and made returnable on May 7, 1914.

Neither in the informations nor in the summonses, nor yet in the order made upon the second summons, is there any indication of the date when the desertion was said to have commenced.

In my opinion there ought in all these cases to be, both in the summons and the order, a statement as to the date when desertion commenced. In the absence of such a statement we are placed in a difficulty as to what the justices really did.

There are two things they might have done on the hearing of the second summons. They might have made an order based upon desertion commencing on December 16, 1913, that is, before the hearing and dismissal of the first summons. If they had taken that course the point as to res judicata, raised in opposition to the second summons, ought to have been given effect to.

(1) [1914] P. 274. (2) [1911] P. 195.
(3) [1913] P. 9.

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But if they were speculating on some subsequent desertion following a resumption of cohabitation, and relied upon that as the basis of their order, they were in this difficulty, that they only had before them the statement of the woman in support of the allegation that resumption of cohabitation had taken place; and this Court is very loth to act upon uncorroborated testimony of that kind. In other words, if some desertion was relied upon based upon a resumption of cohabitation, the justices had not before them sufficient evidence to act upon.

Therefore on either ground the order made by the justices cannot stand, and the appeal must be allowed.

BARGRAVE DEANE J. I am of the same opinion. The justices ought not, upon the uncorroborated evidence of the woman, to find fresh desertion. If there had not been the fresh evidence as to resumption of cohabitation, the matter was res judicata. If, on the other hand, they found fresh desertion based on the allegation of resumption of cohabitation, there was not sufficient evidence to support that finding.

I think the justices made a mistake in deciding the case and in making the order upon the mere ipsa dixit of the woman.

Appeal allowed.

Solicitors: *Tapp, Blackmore & Co., for G. H. King & Franckeiss, Portsmouth.*

H. D. G.

[DIVISIONAL COURT.]

1915
April 23.

HOPE *v.* HOPE.

Husband and Wife—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict. c.* 39)—*Desertion—Appeal by Husband—Poor Person—Order* XVI., *r.* 29—*Wife's Costs—Practice.*

The fact that a husband, who successfully appeals from an order of justices under the Summary Jurisdiction (Married Women) Act, 1895, has been admitted as a poor person is no ground for departing from the usual practice of allowing the wife her costs of appearing in support of an order made by the Court below.

Order XVI., r. 29, gives the Court power to make an order against the husband for the wife's costs.

THIS was an appeal by the husband, John Alfred Hope, from an order made by the justices of the petty sessional division of Brentford, in the county of Middlesex, on February 23, 1915, granting the wife, Henrietta Alice Hope, a separation on the ground of desertion; giving her the custody of the four children of the marriage; and ordering him to pay her 1*l.* a week for maintenance, and the sum of 1*l.* 9*s.* 6*d.* for her costs.

The Divisional Court allowed the appeal, and the only point calling for report was as to costs.

It appeared that the appellant was admitted as a poor person by an order dated April 10, 1915.

Rayner Goddard, for the respondent (wife), asked for her costs, in accordance with the usual practice.

C. D. Clifton, for the appellant (husband), opposed. The appellant has been admitted as a poor person, and the Court has no power to make an order against him for costs.

SIR SAMUEL EVANS, PRESIDENT, read Order XVI., r. 29, and the Court made the order for the wife's costs of the appeal, according to the established practice, where a wife appears to support an

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order made in her favour under the Summary Jurisdiction (Married Women) Act, 1895.

HORRIDGE J. concurred.

Solicitor for appellant: *George E. Huntley.*

Solicitors for respondent: *Peacock & Goddard, for Wilfrid Firth, Brentford.*

H. D. G.

1915

May 12.

IN THE ESTATE OF LADISLAUS OTTO GRUNDT, DECEASED.

IN THE ESTATE OF MARGARET ELIZABETH OETL, DECEASED.

Probate — Practice — Administration — Alien Enemies—Foreign Domicil—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12)—*Custodian—Public Trustee—Court of Probate Act,* 1857 (20 *&* 21 *Vict. c.* 77), *s.* 73—"*Special Circumstances*"—*Limited Grant to Attorney of Next of Kin—Disposal of Residue.*

Limited grants to alien enemies domiciled abroad were under special circumstances allowed to pass, under s. 73 of the Probate Act, 1857, to a British subject, domiciled and resident here, as attorney for next of kin resident abroad, subject to restrictions as to the disposal of the residue.

The Court (Sir Samuel Evans, President), nevertheless, expressed the opinion, as reported in the case of *In the Estate of Schiff* [1915] P. 86, that, as a general rule, it was advisable, in the public interest, that the Public Trustee, as custodian, should take the grants in such cases.

LADISLAUS OTTO GRUNDT, who was a domiciled Hungarian, committed suicide in London on October 24, 1914. He was believed to be a bachelor and intestate, and left his mother, who was resident abroad, his next of kin him surviving.

Margaret Elizabeth Oetl met her death in a similar way and on the same day. She was the divorced wife of Aladar Oetl, died intestate, and left her mother, a British subject but resident abroad, and also a sister, her next of kin her surviving. A verdict of felo de se was returned by a jury.

Each left about 500*l.* personalty in England.

The applicant C. S. Edmondson, a British subject, but no relative of either party, held a power of attorney from both

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mothers, and now applied for a grant of letters of administration in respect of each estate. It appeared that he was sent for after the deaths, and he arranged for their funeral and had looked after their property since that time.

After the solicitors for the applicant were consulted, they wrote to the Public Trustee, in reference to a grant being applied for by the latter, as custodian.

The chief clerk of the Public Trustee wrote on March 15, 1915, acknowledging the receipt of the solicitors' letter, and stating that "as at present advised, it appears to the Public Trustee that the parties in question were not merely Austrian subjects, but were domiciled in Austria"; and adding: "on this assumption, he regrets that he has no power to accept grants of administration, his powers being limited to English trusts."

On March 17, 1915, in acknowledging a further letter from the solicitors, the chief clerk of the Public Trustee, after stating that "in the Schiff case the testator was domiciled in this country," added: "The Public Trustee is advised that he has no power to take a grant to a person having a foreign domicil."

Following on that correspondence, the present motion for a grant to Mr. C. S. Edmondson was made.

W. O. Willis, for the applicant, referred to *In the Estate of Jacob Schiff*. (1)

[SIR SAMUEL EVANS, PRESIDENT. I am informed by the registrar that the Public Trustee did eventually take a grant in that case, although, before the motion was heard, he had expressed some doubt as to the domicil of the deceased.]

He also referred to the Trading with the Enemy Amendment Act, 1914 (5 Geo. 5, c. 12); *In the Estate of Hermann Koenigs* (2); and to the notice, signed by the President under date August 24, 1914, relating to the position of German and Austro-Hungarian subjects with reference to probates and letters of administration during the continuance of the war. (3)

SIR SAMUEL EVANS, PRESIDENT. Having regard to the special circumstances of this case, a limited grant under s. 73 will be

(1) Ante, p. 86. (2) [1915] W. N. 24.

(3) [1914] W. N. 433.

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made to the applicant, on the distinct understanding that immediately he realizes such of the estate as he is entitled to deal with under a limited grant, he will at once hand over the proceeds to the Public Trustee, as custodian.

I deal with this case specially on its own facts; and, in doing so, I desire to emphasize and repeat what was stated, after consultation with me, in the case of *In the Estate of Jacob Schiff* (1), that, in the very large majority of cases where persons belonging to either of the enemy States die in this country leaving property here, it is most advisable that the Public Trustee should take a grant of administration.

Although the Public Trustee stated in his letter to the solicitors for the applicant that he thought he could only take a grant to the estates of persons dying domiciled in this country, communications have passed between him and myself which, I think, have now satisfied him that he can take grants in the case of persons dying domiciled elsewhere.

Solicitors: *Ashurst, Morris, Crisp & Co.*

(1) Ante, p. 86.

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HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

1915
May 3, 4, 5, 6, 21.

ADMIRALTY.

[In Prize.]

THE OPHELIA.

[1914 No. 464.]

Prize Court—Military Hospital-Ship—User for other Purposes—Signalling Vessel—Spoliation of Documents—Geneva Convention, 1906—*Hague Convention*, 1907, *No.* 10, *art.* 1.

In a claim on behalf of the Imperial German Government for the release of a vessel, the terms of art. 1 of the Hague Convention, 1907, No. 10, were relied upon, by which "Military hospital-ships, that is to say, ships constructed or adapted by States for the particular and sole purpose of aiding the sick, wounded, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . . shall be respected, and may not be captured while hostilities last":—

Held by the President (Sir Samuel Evans), that the vessel in question being an enemy ship must be condemned as lawful prize, for she had forfeited the protection claimed under the Convention, in that the evidence showed that she was not constructed, adapted, or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, but was adapted and used as a signalling ship for military purposes.

The doctrines of the Prize Courts relating to the spoliation of documents apply in a special sense to vessels claiming to be hospital-ships, and the destruction of the ship's papers, on the eve of capture, will lead to unfavourable inferences.

Claim by Naval Staff-Surgeon Pfeiffer, on behalf of the Imperial German Government, for the release of the auxiliary military hospital-ship *Ophelia*, seized and taken as prize by H.M.S. *Meteor*.

The following summary of the material facts is taken from the judgment of the President:—

The steamship *Ophelia* was, up to the time of the war, a merchant vessel, trading chiefly between London and Hamburg. On August 3, 1914, she was in the Port of London.

Pursuant to an order of the German Government conveyed through the German consul-general she was on that day

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directed (in the words of her log) "to steam to a German port for military duties." On the next day (August 4) she received 344 passengers on board, and proceeded down the Thames on her voyage to Hamburg. War was declared between this country and Germany as from 11 P.M. on that night. On the afternoon of August 5, when she arrived at Norderney, she received orders from a German torpedo-boat to steam to Heligoland. Next day she steamed to the Elbe, and having landed her passengers at St. Pauli landing-stage she proceeded to Hansa Harbour. On August 10 she was in Hamburg, and the entry in her log is, "The ship was refitted as a hospital-ship by the Hamburg-Amerika Line for the German Government." The next entry is "August 12. Work on ship continued. Finished by the evening. Took in provisions." On August 13 she steamed down the Elbe, passed through the Kiel Canal, and anchored at Kiel. On the next day (August 14) Dr. Pfeiffer took over the command of the vessel as staff-surgeon. Various alterations were afterwards carried out and inspections by fleet surgeons made. Subsequently the vessel proceeded to Brunsbuttel. While she was there on September 11, 1914, the German Government issued a certificate declaring her to be a hospital-ship.

This certificate, in German and in French, was found upon the vessel at the time of capture.

The translation of the French copy is as follows:—

"Designation of the military hospital-ship *F. Ophelia* for the war.

"The military hospital-ship *F. Ophelia* has been equipped by the German Government specially and solely with the object of giving help to wounded, sick, and shipwrecked persons. Her name has been communicated to the belligerent Powers. The Government undertakes to use these ships for no other military purpose. (Articles 1 and 4 of the Convention of October 18, 1907, for the adaptation to maritime war of the principles of the Geneva Convention.)

"Kiel, September 11, 1914.

"The Commandant of the Naval Station at Kiel.

"(Signed) Bachmann,

"(L.S.) Vice-Admiral."

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The claim put forward by Dr. Pfeiffer as staff-surgeon or chief medical officer in control on behalf of the German Government, and his affidavit in support, state that "the ship completed her fitting out at Wilhelmshaven, whence she sailed on October 6, 1914."

Being examined in chief at the hearing, Dr. Pfeiffer answered his counsel's questions as follows:—

"Q. You got your certificate as a hospital-ship, I think, dated September 11?—A. Yes.

"Q. What was the first date on which the *Ophelia* was sent out?—A. On the evening of October 7, after the torpedo-boat *S.* 116 had been sunk on the 6th."

But meantime the evidence showed that the ship had left Brunsbuttel on September 18 for Heligoland, and remained at or near Heligoland for about a fortnight.

Dr. Pfeiffer was asked in cross-examination why the ship went on this voyage to Heligoland, and he answered as follows:—

"Q. The ship went on her voyage to the island of Heligoland in September?—A. Yes.

"Q. What did it do that for?—A. The ship had orders to go there.

"Q. So you were obeying orders given to you?—A. Yes.

"Q. And do you know the reason for the orders?—A. No.

"Q. So far as you know, had the orders anything to do with hospital service?—A. No, so far as I know, not.

"Q. Before the *Ophelia* made her voyage to Heligoland there had already been fighting on the sea between Heligoland and Germany?—A. Yes, I heard so.

"Q. The previous month?—A. Yes, in August."

The ship left Heligoland on October 3, and proceeded under orders, presumably, to Wilhelmshaven.

On the morning of Tuesday, October 6, about 8.45 A.M., she proceeded from Wilhelmshaven to Schillinghorn, and shortly before noon anchored in the Schillinghorn roadstead, at the mouth of the Weser.

The circumstances of this and the two following days are very important, because on October 8 a British naval officer commanding a British submarine sighted the *Ophelia* engaged

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in certain operations which the claimants allege were performed solely in pursuance of her legitimate duties as a hospital-ship, but on which the Crown rely as tending to show that she was engaged on military duties inconsistent with an innocent hospital-ship.

To go back to the morning of October 6, a German destroyer was sunk at about 11 A.M. (English time) off the river Ems. At this time the *Ophelia* was on her way from Wilhelmshaven to Schillinghorn, and she anchored there about 11.50 A.M. English time (12.50 Mid-European or German time). She remained there at anchor for between eight and nine hours. At 8.30 P.M. (German time) she received orders to steam at once to the mouth of the Ems. She weighed anchor, but about an hour later when she got near a German warship—the *Beowulf*—she received a verbal order from that warship to go back; she accordingly returned and anchored again at about 11 P.M. up the river.

The staff-surgeon in command of the *Ophelia* said the only orders he got on October 6 were to steam to the mouth of the Ems. He said afterwards that he thought something had been said about the sinking of the *S.* 116, but he was not certain. He, in fact, did not know why he had been advised to go at 8.30 P.M. or why he had the counter order not to go but to return about 10 o'clock.

On the next morning the *Ophelia* weighed anchor, but not until 10 o'clock in the morning: she proceeded towards the mouth of the river Ems; but before reaching it she again anchored at 8.30 P.M. outside Borkum, and remained anchored till next morning (October 8) about 7 o'clock.

The place where the torpedo-boat was sunk was known to Lieutenant Guilleaume, the officer on watch of a torpedo-boat which the *Ophelia* passed on this morning; but no inquiries seem to have been made of him, nor was any information obtained.

A flotilla of about five torpedo-boats lay at the mouth of the Ems on the 7th and 8th, but none of them appear to have looked for survivors, or helped the *Ophelia* to do so.

The *Ophelia* is said to have reached the locality where the *S.* 116 was sunk about 10 o'clock and to have taken a zig-zag

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course to the north and west for a distance of about 3 miles, and after employing herself for about an hour in this way she steamed back again at full speed up the Ems. There she remained anchored at two different places during the afternoon and night of the 8th and till the morning of the 9th, when, pursuant to orders, she voyaged back to Hamburg.

Forty-eight hours had passed between the sinking of the German submarine and the arrival near the spot of the *Ophelia*. The distance from Schillinghorn to the place was about 60 miles. This she could cover in less than six hours. Even if she did not steam by night, she could have arrived in daylight on the 7th by about mid-day; she did not arrive, however, till about twenty hours afterwards. I heard no explanation of this lamentable and possibly fatal delay on the part of a hospital-ship, said to have been on a mission to try to rescue survivors.

She saw no survivors or corpses in her search, which was not only belated, but which was very short and inadequate. There was an entire absence of the care, deliberation, thoroughness, and completeness to be expected in such a search.

But other things happened about the time of these events on the morning of October 8.

The *Ophelia* saw a British submarine. It is logged that she sighted it at 9.30 A.M. (German time) about 11 miles from Schiermonikoog, and again at 11.40 when 7 or 8 miles away.

The British submarine also sighted the *Ophelia*. The circumstances are set out in the affidavit of Lieutenant-Commander Moncrieffe—I will not recount them all. The hours are given in English time. I will give a part of his story in his own words :—

"At 10 A.M. when the steamer was about 4½ to 5 miles from me and was in a position which could be accurately described as near Schiermonikoog she evidently sighted me. She hoisted a large Red Cross flag at the main. At the same time dense black smoke commenced pouring out of the funnel and she began to increase speed and bear away to the northward. I increased speed to 11 knots.

"At 10.5 A.M. the steamer altered course to east, still increasing speed, and she hauled down the Red Cross flag. There was no apparent reason for her to do so unless the taking down of the

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flag was a signal to the enemy, or was a flag she was not entitled to fly. I also altered course east, thereby placing the steamer fine on my port bow.

"At 10.18 A.M. the steamer was right ahead and I kept her right ahead by steering S. 85′ E., and I chased her. She appeared to increase speed by about 2 to 3 knots. I did not signal to her to stop because she was obviously running away from me, and I had no means of making her stop.

"At 10.30 A.M. it became clear I could not overtake her, so I reduced to 7 knots and altered course to south.

"About 10.45 A.M. the steamer altered course to the southward.

"At 11 A.M. I altered course west and lost sight of the steamer at 11.15 A.M. She was then still steering into the Western Ems.

"The steamer quite unmistakably fled from me after sighting me in order to escape search.

"I am confident that the steamer was the *Ophelia*, as she corresponds with the description of the *Ophelia* given in the affidavit of Commander Edward J. K. Newman, R.N., and not with that of any of the other German hospital-ships with which I am acquainted, and the photographs exhibited to the said affidavit, which I have inspected, are photographs of the steamer I saw as before described on October 8."

It was admitted at the hearing that the steamer was the *Ophelia*. Lieutenant-Commander Moncrieffe also says:—

"I had been patrolling in the neighbourhood since about 10 A.M. on October 7, and there was no reason that I can suggest why a hospital-ship should have been where the *Ophelia* was when I had her under observation on the 8th. There was nobody in the neighbourhood and no ship for a hospital-ship to aid. With the exception of a German submarine, which I saw about 20 miles further west at 10.30 A.M. on the 7th, and a Zeppelin at about 2.45 P.M. on the 7th, I saw nothing beside the *Ophelia* on the 7th, 8th, or 9th. The German submarine dived as soon as she saw me. She appeared to be outward bound to sea."

And further:—

"With reference to the entry in the *Ophelia's* log which has

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since been drawn to my attention I am quite certain she was not searching for a sunken torpedo-boat or any sunken vessel."

Dr. Pfeiffer denied that the *Ophelia* ran away from the submarine. Neither the navigating captain nor any one else was called to explain the operations of the ship on the morning of October 8.

In answer, however, to the allegations that, although the speed of the commander's submarine was increased to 11 knots, the *Ophelia* was able to get away, a strenuous attempt was made for the claimants to prove that the *Ophelia's* maximum speed capacity at her best was about 10 knots, and that her full speed at the time in question was about 9 knots. Dr. Pfeiffer said "The maximum speed was $8\frac{1}{2}$ to 9 miles." This attempt wholly failed. But it is not insignificant that the attempt was made. On the very last voyage of the *Ophelia* (as a merchant vessel from London to Hamburg), according to the records in her own log in the twelve hours from midnight to mid-day on August 5, 1914, her average speed according to her patent log was over $11\frac{1}{2}$ knots; and in the hour between 1 and 2 P.M. the log records 13 knots; while between 3.25 and 5.20 P.M. the patent log shows a run of 27 miles, which is equivalent to a speed of over $13\frac{1}{2}$ knots. No explanation of these telling figures was given. Moreover, a glance at the last log-book of the vessel, which begins in May, 1914, will show that on many voyages between London and Hamburg the speed recorded by the patent log goes up to 11, $11\frac{1}{4}$, $11\frac{1}{2}$, $11\frac{3}{4}$, and up to 12 knots.

It is to be remembered, too, that on October 8, apart from the spurt which Lieutenant-Commander Moncrieffe suggests was given to the engines, the *Ophelia* was in ballast and in excellent trim for travelling. Upon the disputed question which the account given by the commander raises one naturally asks why, as the hospital-ship saw the submarine more than once, she did not speed towards it rather than away from it in order to try to get some information about the locus of the accident, or the saving of the seamen, or the possibility of rescuing survivors? Those in command of a genuine hospital-ship on a humane quest would not fear any harm or ill-treatment from a British submarine or any other war vessel.

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After the order received by the *Ophelia* on the evening of October 8 to go to Hamburg she seems to have proceeded leisurely, arriving there on the 10th.

She remained there till the 15th, and in the interval her two masts were lengthened in order to improve and increase the range of the wireless telegraphy.

It now remains to see how the *Ophelia* was employed from this time until her capture. On the 15th she left Hamburg and anchored during the night in the Elbe, and then went on another voyage to Heligoland. Captain Ridder joined her as navigating captain on October 16. He was only on the vessel for three days. No other navigating officer was called who could speak of the dates between September 11 and October 15.

Staff-Surgeon Pfeiffer always followed orders in directing the movement of the ship. He gave no reason for or explanation of this last voyage to Heligoland.

While there, in the evening of October 17 (some time after 7 P.M.), he said that he received by wireless telegraphy sealed and in code from the Chief of the Tross of the German ship *Würtemberg* a message of which the translation was given as follows :—

"Wireless message from *Würtemberg* to auxiliary hospital-ship *F.*

"*Sealed.* 7 P.M., October 17, 1914. Go at once to Haaks (Finger) Lightship. Further instructions to follow.

"Tross Chef."

The vessel accordingly was put on a course for the Haaks Lightship.

A little after 1 o'clock, not having received any further instructions, and not knowing what he had been ordered down there for, Dr. Pfeiffer sent a message by wireless telegraphy to the station at Norddeich. It was sent in code, and the effect of it was given to the Court as follows :—

"Please send following telegrams to *Würtemberg.* Am at Haaks Lightship. Request further instructions."

Shortly afterwards the following reply was received on the *Ophelia* from the Norddeich Station.

"Search 3° 55′ east. 52° 51′ north and neighbourhood. Norddeich."

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These two messages were heard although not understood by Mr. Cox, the wireless telegraphy operator on board H.M.S. *Lawford*, then on patrol duty in the North Sea. He instantly reported this to Lieutenant-Commander Scott, and said the strength of the signals indicated that they were sent in their vicinity. Very shortly afterwards the *Ophelia* was sighted. She was signalled to stop by a squadron of British warships, and Lieutenant-Commander Peters, of H.M.S. *Meteor*, boarded her, but before he came several documents were thrown overboard the *Ophelia* by command of Dr. Pfeiffer, as will be stated later when I deal with the destruction of papers then and at a later date. As to what took place when Lieutenant-Commander Peters came on board, the following answers were given by Dr. Pfeiffer.

"Q. What took place when Lieutenant Peters came on board?—A. Lieutenant Peters asked me why we were there—what we were looking for there. In the first place I answered him saying I did not know.

"Q. (repeated) Answer both those questions—why are you here?—what are you looking for?—A. He asked me for what reason we were in that region. I told him that I had been ordered to come there and I knew nothing more."

This agrees in substance with the account given by Lieutenant-Commander Peters in his affidavit.

Some ship's papers were given up to the lieutenant-commander, but so far as the Court was informed nothing was said about the papers or documents which had been thrown overboard.

On this day the *Ophelia* was captured, ordered to haul down her flag, and taken into an English port for the purpose of being dealt with by this Court in Prize.

1915. May 3, 4, 5, 6, 21. *The Attorney-General* (*Sir John Simon*), the *Solicitor-General* (*Sir Stanley Buckmaster*), and *C. Robertson Dunlop*, for the Crown, on behalf of the captors claiming condemnation of the steamship *Ophelia*. The question for the consideration of the Court is whether this vessel, the *Ophelia*, admittedly a German ship, and of which Staff-Surgeon Pfeiffer

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was in command at the time she was seized, is entitled to the exemption which attaches to vessels which are engaged solely in the proper work of hospital-ships. If she is such a vessel, the Crown would wish to give to her the full exemption which international agreement and the dictates of humanity would suggest; but there are circumstances about this vessel which have made it seem to the Crown right that she should be brought to this Court that the matter may be investigated.

It will be convenient, at the outset, to draw attention to the provisions of the Hague Convention, that is, No. 10 of the Conventions, which are included in the proceedings in the second Peace Conference—the conference held at the Hague in 1907. It is a "Convention for the adaptation of the principles of the Geneva Convention to Maritime War." It will be observed that the first of the parties who were expressed to be bound by it is His Majesty the German Emperor, and of course this country is also bound by it. The first article is this: "Military hospital-ships, that is to say, ships constructed or adapted by States for the particular and sole purpose of aiding the sick, wounded, and shipwrecked"—in the French it is: "Spécialement et uniquement en vue de porter secours aux blessés, malades, et naufragés"—"the names of which have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in any case before they are employed, shall be respected, and may not be captured while hostilities last. Such ships, moreover, are not on the same footing as warships as regards their stay in a neutral port"—that is, the twenty-four hours rule—and so on. It will be observed in that article that the purpose, the sole purpose, and the special purpose which is therein indicated is the purpose of aiding. The English text is the "sick, wounded, and shipwrecked." In the French, "secours aux blessés, malades, et naufragés."

Then art. 2: "Hospital-ships equipped wholly or in part at the expense of private individuals or officially recognized relief societies, shall likewise be respected and exempt from capture, if the belligerent Power to which they belong has given them an official commission." The Red Cross societies in some cases have taken advantage of that provision, and there was a case in the

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Russo-Japanese war which was claimed to be under art. 2, of a ship called the *Ayrol*, which was a ship which was commissioned by the Red Cross Society. Then art. 3 also deals with hospital-ships which are "equipped wholly or in part at the expense of private individuals." Art. 4: "The ships mentioned in articles 1, 2, and 3 shall afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality." The duty of rescue is a duty which attaches equally to the sailors of all belligerent navies. "The Governments undertake not to use these ships for any military purpose. Such vessels must in no wise hamper the movements of the combatants. During and after an engagement they will act at their own risk and peril. The belligerents shall have the right to control and search them; they may refuse to help them, order them off, make them take a certain course, and put a commissioner on board; they may even detain them, if the situation is such as to require it. The belligerents shall, as far as possible, enter in the log of the hospital-ships the orders which they give them." In that article —art. 4—the most important clause for present purposes is the second one: "The Governments undertake not to use these ships for any military purpose"; and the allegation which is made here, and which we would like investigated, is: Was this ship, the *Ophelia*, though ostensibly a hospital-ship, in fact engaged in scout duties?—which, of course, would be duties with a military purpose; and it follows necessarily that if that be so, then any protection which this Convention gives to such a ship disappears.

Then art. 5 is important. "Military hospital-ships shall be distinguished by being painted white outside, with a horizontal band of green about a metre and a half in breadth. The ships mentioned in articles 2 and 3—that is to say, hospital-ships which are not military hospital-ships, but are fitted out by private societies or individuals—are to be distinguished by being painted white outside with a horizontal band of red about a metre and a half in breadth." This vessel purported to be a military hospital-ship, and therefore the band was green about a metre and a half in breadth. "The boats of the said ships, as also small craft which may be used for hospital work, shall be distinguished by

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similar painting." Then comes the clause in art. 5, which has a bearing here: "All hospital-ships shall make themselves known"—that is to say, whether they are the State's hospital-ships or private ones—" by hoisting, with their national flag, the white flag with a red cross provided by the Geneva Convention, and further, if they belong to a neutral State, by flying at the mainmast the national flag of the belligerent under whose orders they are placed." So that in this case of the *Ophelia* the flag would be the national flag of Germany and the white flag with the red cross—the ordinary large red cross flag. " Hospital-ships which are detained under article 4 by the enemy must haul down the national flag of the belligerent to whom they belong"—that shows clearly that they are expected to fly it until they are so detained. " The ships and boats above mentioned which wish to ensure by night the freedom from interference to which they are entitled, must, subject to the assent of the belligerent they are accompanying, take the necessary measures to render their special painting sufficiently plain"—(?) by illumination at night. Art. 6: "The distinguishing signs referred to in article 5 shall only be used, whether in peace or war, for protecting or indicating the ships therein mentioned." Then there are provisions in arts. 7, 8, and 9 which appear to refer rather to the general treatment of wounded and those responsible for looking after them in a ship of war, and not to be confined to military hospital-ships in particular; but it is right to call attention to the last words of article 8: " Hospital-ships and sick-bays of vessels are no longer entitled to protection if they are employed for the purpose of injuring the enemy." The French text is: " Si l'on en use pour commettre des actes nuisibles à l'ennemi." " The fact of the staff of the said ships and sick-bays being armed for maintaining order and for defending the sick and wounded, and the presence of wireless telegraphy apparatus on board, are not sufficient reasons for withdrawing protection." This vessel, the *Ophelia*, had wireless apparatus, and certainly that circumstance standing alone would not justify her condemnation; but the Crown would wish to draw attention to the character of the wireless apparatus which she had, and to the use which she was making of it.

The writ, dated January 27, is addressed " To the owners and

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parties interested in the ship *Ophelia*, of the port of Hamburg, and the goods laden therein, seized and taken as prize by our ship of war *Meteor*.—A. F. W. Howard, Commander." And the indorsement is this: "The claim herein is for a decree that the said ship and the goods therein belonged at the time of capture and seizure to enemies of the Crown "—that will not be disputed; there is no dispute whatever that it is a German Government vessel—" and as such or otherwise, is subject and liable to confiscation, and that the same, together with her tackle, apparel, furniture, stores, and the goods laden therein, be condemned as good and lawful prize, and that the said ship be appraised and sold by the Marshal." The date of seizure here, or capture, is October 18, and when the vessel was seized, amongst other things, of course, there fell into the hands of the British authorities the log and the other ship's papers on the *Ophelia*. It will be convenient to give a chronological statement.

A hospital-ship which we believe to be the same vessel was observed by another British vessel on October 8, ten days before. As matters then stood, it might be in dispute whether the vessel observed on October 8 was really the *Ophelia* or not; but we have independent testimony from our own navy as to what this vessel was doing on October 8, and any doubt as to whether it was the *Ophelia* is put to rest by examining her own log, because whatever she was doing on October 8 it was undoubtedly the *Ophelia* we were observing ten days before October 18 when she was captured.

On August 3 the *Ophelia* was in the Port of London. She was a vessel belonging to a trading company called the Kiersten Company, of Hamburg, and on August 3, the day before the outbreak of war between England and Germany (the declaration of war took effect at 11 o'clock at night on August 4), the *Ophelia* received orders to proceed from London to a German port for military duties.

With reference to this the entry (translated) in the ship's log-book is: "Log-book kept on board the German steamship *Ophelia*, Captain Vormeng, Home Port, Hamburg, distinguishing signal, R. S. G. B. Monday, August 3, in London received orders from the consul-general that on Tuesday the 4th instant, by order of the German Government, the ship was to steam to

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a German port for military duties." Inasmuch as she was not a ship of war, but a German commercial vessel, that seems to show that she had already been in some way registered or chosen for military services. The next day, Tuesday, August 4, she does leave. She receives 344 passengers at 12 o'clock: "Pilot on board steamed out of dock down the Thames," and it was at 11 o'clock on the night of that day that war broke out between England and Germany. Then she goes to Hamburg.

On August 5 she received orders from a torpedo-boat to steam to Heligoland, and ultimately she passed up the Elbe, and on Monday, August 10, she is in Hamburg: "In Hamburg, 4 A.M., went to the Reiber Quay. The ship was refitted as a hospital-ship by the Hamburg-Amerika Line for the German Government. Wednesday, August 12, work of ship continued. Finished by the evening. Took in provisions. Thursday, August 13, 10 A.M. pilot on board steamed down the Elbe. 2.30 P.M., Kaiser Wilhelm Canal, changed pilots steamed through canal"—that is going to the Baltic Sea—"11.15 in Holtenau steamed to Kiel (Fohrde), 11.50 P.M. anchored. Friday, August 14, in Kiel (Fohrde), 6.30 weighed anchor. Pilot on board steamed to harbour. Staatsartz Pfeiffer took over the command." It is enough to show that Pfeiffer takes command on August 14. After that they are painting the ship, which, amongst other things, means painting it white and putting this big green band on it. Wednesday, August 19: "Took hospital requirements on board. Thursday, August 20, took hospital requirements and provisions on board." There is also making "alterations to ship." Whatever else the ship was, if the ship was not built as a hospital-ship, there would be some changes to be made in its structure.

[THE PRESIDENT. I thought it right to go and see the vessel, and I inspected the vessel myself with the Marshal on Thursday last.]

The Attorney-General. That makes the explanation of these matters simpler.

The next material date is August 31: "In forenoon drill for hospital orderlies and bearers; Tuesday, September 1, hospital rooms painted; 10 A.M. ship steamed to buoy S.; Wednesday, September 2, took in sand ballast." Then September 3:

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"Inspected by fleet-surgeon. September 4, received linen and mattresses for hospital beds. Saturday, September 5, everything seen to in hospital. 7 P.M. received orders to go to Cuxhaven." On September 6 the entry is: "11.45 A.M., ship made fast in Brunsbuttel Lock. Inspected by fleet-surgeon, &c." Then she is at Cuxhaven later on that day. Then on Wednesday, September 9: "1 A.M., receive orders to go to Brunsbuttel. 5.30, pilot on board towed by two tugs. Hoisted boats 7.15 proceeded under direction of pilot. 10.14 anchored near Kaiser Wilhelm Canal. Pilot ashore 11.45; pilot on board weighed anchor, steamed into canal. 1.35 ship made fast at breakwater. Painted ship. Naval crew rowed in boats 3 and 4. Friday, September 11, hospital drill. Naval crew rowed in boats. Saturday, September 12, in Brunsbuttel." (Brunsbuttel is in the North Sea.) "Naval crew at hospital drill. Monday, September 13, naval crew at hospital drill." The certificate of her intended use as a hospital-ship is dated September 11, so that it comes in just at that moment. It is one of the ship's papers which we found on her when she was seized. It is both in German and in French (1), and there is a reference to arts. 1 and 2 of the Convention of October 18, 1907, on the adaptation of the principles of the Geneva Convention for Maritime War. It is executed at Kiel on September 11, 1914. Therefore so far as regards all formal steps this case must be treated—and the British Government desire that it should be in every way treated—as a case where the formal records of the Convention, and all that it contemplates in the Convention, have been complied with; the question here being, not whether its formal requisites were complied with, but what was the actual use which was made of the vessel. Now, returning to the log, the next thing to notice is that on Thursday, September 17, the vessel "took in 42 tons of coal. Cleaned ship." On the next day, started September 18 "on voyage from Brunsbuttel to Heligoland. 5 A.M. pilot on board, steamed to lock. 6 A.M., towed through, changed pilots. Steamed down Elbe; 7.25 passed Cuxhaven; 9, steered in sight of Cuxhaven. 11.45, anchored off South Harbour. 5 P.M.,

(1) See above for a translation from the French.

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naval crew at hospital drill." On September 18 she leaves Brunsbuttel Koog and she goes down the Elbe past Cuxhaven out into the open sea and across to Heligoland, and the next thing that happens, after waiting for about a fortnight, is that she takes her voyage almost due south to Wilhelmshaven roadstead on October 3—that is her next trip. Then she stays there for three days, and she is off again on October 6. She comes out and she takes a very curious course. She takes the course, when she comes out of Kiel, to the westward and back again almost exactly on the same line. Then the next day she runs a little bit further out, and then she takes a long course to the south and west. On October 7 she is running right along past Borkum. Then she comes to a point close to Weser Gat. Then she runs out a bit and goes down to the mouth of the Western Ems. There she pauses and from time to time dodges backwards and forwards. It is fair to point out that she is there at the mouth of the German river, the Western Ems. Then she comes out again. Now on October 9 she is going eastward, and she passes again along the whole of the German front past Borkum and so on until she reaches the mouth of the Jade, and she goes right up the Elbe again to Brunsbuttel—that seems to be for examination—and then to Hamburg. Then on the 15th she comes down the Elbe for the last time. She comes down past the mouth of the Elbe, and on the 16th she again gets to Heligoland. Then on the 17th she leaves Heligoland on a south-westerly course. She comes down past Norderney; then she goes further out to sea; then she goes further west than she has ever been before. On October 16 she is right off the Western Ems, and at 4 o'clock in the morning she is up the Ems. At 8 o'clock she is further west. By 9 she has reached the point on the chart marked "D.R." She then changes her course southerly, and she has got as far as the end of the line there at 3 P.M. on October 18 in nearly 53 degrees of latitude, and that is the point where she stopped, when she was caught off the coast of Holland.

Turning now to the affidavit of Lieutenant-Commander Moncrieffe, who was lieutenant-commander of the submarine *D.* 4, the submarine which had her under special observation on October 8.

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He says: "I, John Robert Guy Moncrieffe, a lieutenant-commander in H.M. Navy and commanding officer of H.M. submarine *D.* 4, make oath and say as follows: 1. All courses mentioned herein are 'true.' 2. On the morning of October 8, 1914, I was on patrol duty in the North Sea and was navigating unsubmerged. At 9.15 A.M. according to the boat's clock, which may not have been quite accurate, I sighted smoke south-eastward, apparently a vessel coming from the Hulber Gat and moving in a westerly direction along and near the coast." Hulber Gat is just a little bit to the west of the mouth of the Western Ems, and on October 10 this vessel, the *Ophelia,* was just in that neighbourhood; so that he sees or sights a steamer's smoke about 9.15 in the morning, "moving in a westerly direction along and near the coast." "Altered course to south to find out what she was." So that the submarine turns in closer to the coast of Germany. "At 9.28 in latitude 53·45 north, longitude 5·46 east"—a little bit to the west and the northward of the track of the *Ophelia*—"I sighted two masts and one funnel of the vessel"—the *Ophelia* has two masts and she has one funnel. "She had altered course to the northward. I accordingly altered course of my submarine to east, speed 8 knots, in order to close on her"—there is an indication on our chart that the *Ophelia,* after running a little north by west for some distance, turned northward or a little east of northward, north-east perhaps, before she proceeded to go back. "At 9.45"—that is, seventeen minutes later—"the steamer altered course to about north-west and I accordingly altered my course to north-east in order to intercept her. While on this north-easterly course I made out that the steamer's hull was painted white with a green band, indicating that she was a military hospital-ship under art. 1 of the Hague Convention No. 10. She was flying an ensign which I could not make out then or later, but it was not the national flag of Germany." That is the lieutenant-commander's evidence, and the article says that a military hospital-ship should fly the national flag as well as, of course, the Red Cross flag; but she was not flying the national flag of Germany, for he is near enough to see the colour of the band on her hull; so that he is fairly close. "At 10 A.M."—that is, a quarter of an hour later—"when the

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steamer was about 4½ to 5 miles from me and was in a position which could be accurately described as near Schiermonikoog, she evidently sighted me"—that is, a little bit to the west of the real position—" she hoisted a large Red Cross flag at the main. At the same time dense black smoke commenced pouring out of the funnel, and she began to increase speed and bear away to the northward. I increased speed to 11 knots." It is not apparent to the British Government why a hospital-ship should need to run away from anybody, but "at 10.15 A.M. the steamer altered course to east, still increasing speed, and she hauled down the Red Cross flag. There was no apparent reason for her to do so, unless the taking down of the flag was a signal to the enemy, or it was a flag she was not entitled to fly. I also altered course east, thereby placing the steamer fine on my port bow. At 10.18 the steamer was right ahead, and I kept her right ahead by steering south 85 east, and I chased her. She appeared to increase speed by about 2 to 3 knots. I did not signal to her to stop because she was obviously running away from me, and I had no means of making her stop. At 10.30 A.M."—that is, twelve minutes later—" it became clear I could not overtake her, so I reduced to 7 knots and altered course to south. About 10.45 A.M. the steamer altered course to the southward. At 11 A.M. I altered course west and lost sight of the steamer at 11.12 A.M. She was then still steering south and apparently steaming into the Western Ems. The steamer quite unmistakably fled from me on sighting me in order to escape search. I am confident that the steamer was the *Ophelia*, as she corresponds with the description of the *Ophelia* given in the affidavit of Commander J. K. Newman, and not with that of any of the other hospital-ships with which I am acquainted, and the photographs exhibited to the said affidavit which I have inspected are photographs of the steamer I saw as before described on October 8. In my opinion the *Ophelia* was engaged in scouting, and the reasons for that opinion are: (1.) Her alterations of course which I have described. There was no reason, I think, connected with ordinary navigation such as the avoidance of shoals or mines. (2.) I had been patrolling in the neighbourhood since about

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10 A.M. on October 7"—that is, since the morning of the previous day—"and there was no reason that I can suggest why a hospital-ship should have been where the *Ophelia* was when I had her under observation on the 8th. There was nobody in the neighbourhood, and nobody for a hospital-ship to aid. With the exception of a German submarine, which I saw about 20 miles further west at 10.30 A.M. on the 7th, and a submarine at about 2.45 P.M. on the 7th, I did not see anything besides the *Ophelia* on the 7th, 8th, or 9th. The German submarine dived as soon as she saw me. She appeared to be outward bound to sea." That is the second of his grievances, and the third is: "Her hoisting and afterwards taking in the Red Cross flag. The flag would have been visible in the weather conditions on the morning of the 8th for about 15 miles"—it must have been a very big one—"and ought to have been kept flying if she was engaged on hospital duties. (4.) She unmistakably fled from me after sighting me in order to escape search. With reference to the entry in the *Ophelia's* log which has since been drawn to my attention, I am quite certain she was not searching for a sunken torpedo-boat or any sunken vessel." That is the inference he draws.

The Germans had had a loss shortly before in the mouth of the Western Ems, and the suggestion is that she was out there in connection with some loss which had occurred before in that part of the North Sea. "I duly reported to my superior officer afterwards what I have stated above."

Now, returning to the log, the next entry to look at is: "Saturday, October 3, on voyage from Heligoland to Wilhelmshaven. 8.30 A.M. weighed both anchors steered towards the Norder Grunde Buoy; 10.40, passed buoy. 11.40, pilot on board, proceed under his direction; 2.40, anchored in Wilhelmshaven roadstead. 5.30, changed pilots, weighed anchor, steamed to Wilhelmshaven. 7.30, ship made fast alongside the *Viola*. Pilot ashore." 8.30—this is on October 6, and the date is important in reference to the possible explanation, because we must ascertain what is the precise date when it is suggested that this disaster took place. On October 6: "8.30 P.M. received orders to steam at once to mouth of Ems"—that is the point

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where she was observed. "Pilot on board. Weighed anchor. Came near to S.M.S. *Beowulf*, received counter order. Steamed back." It is regrettable that what the order was does not appear in the log; but "steamed back" means came back more or less to Schillinghorn roadstead. It is the first of these cases where she seems to have turned on her track. She goes out a little, receives her counter order, and comes back again. So that having orders to go there on the 6th she is called back again. Then she anchors for the night in 45 fathoms in Schillinghorn, just at the mouth of the Weser. On October 7 we have got a detailed log. It is "Wednesday, October 7, 1914. Log-book of the ship *Ophelia* on the voyage from Schillinghorn to sea." There is an entry "10 o'clock weighed anchor, steered outwards in accordance with instructions of pilot. Jade. At 10 o'clock the pilot left the ship off the Weser Buoy. 12.10, steered as follows"—then there are some details. Then at 5 o'clock in the evening: "Overcast, steered by bearings. 5.40, Oster Ems Buoy P.L. 44 from Borkum Light Buoy; 7.30, pilot on board steamed on under his instructions (Pilot Langenbaum). 8.30, anchored S.T. anchor." Then they set the watch. Then on the next page, October 8—this is the day when the *Ophelia*, as we say, was being watched by our submarine: "Thursday, October 8, 1914, log-book of the hospital-ship *Ophelia F.* on the voyage from the Ems and back; weighed anchor at 6.50, and under instructions from the pilot steamed out of the Ems guided by land-marks. . . . . On the look out for a sunken torpedo-boat." That is important. It is a little difficult to read. It is in ordinary writing and of course in the German character, and there is no justification for suggesting that anything has been added unfairly to the log. It runs on in the log, and it is written at the same time undoubtedly as part of the contemporaneous record, and is interesting as corresponding with Lieutenant Moncrieffe's observations between 9 and 10. The time in the German log is presumably Mid-European time, and consequently there is a difference of an hour. In order to find that something corresponds with our observations between 9 and 10 and 11, we must find something in the German log between the hours of 10 and 11. It is curious that the affidavit of the commander of our submarine *D.* 4 should be so precise as to the

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movements of this vessel, and should record so accurately and in such detail how the *Ophelia* put on steam, and apparently was doing her best to run away from him, whereas all this log says is: "11.40 sighted submarine *W.* 7—8 sea miles away. 11 o'clock steered back to the Ems." It is suggested that this submarine was *D.* 4, because 11.40 in our own records would be somewhere between 10 and 11. "Commander Moncrieffe says in paragraph 5 of his affidavit at 10 A.M. when the steamer was about 4½ to 5 miles from me, and was in a position which could be accurately described as near Schiermonikoog, she evidently sighted me. She hoisted a large Red Cross flag at the main." This would be between 10 and 11 English time—between 11 and 12 German time, namely, 11.40—"sighted submarine *W.* 7—8 sea miles away, steered back to Ems."

Lieutenant Peters says in his affidavit sworn on March 17: "I, Frederick Thornton Peters, holding the rank of lieutenant in H.M. Navy of H.M. ship of war *Meteor*, whereof Lieutenant A. F. W. Howard was commander at the time of the capture of the *Ophelia*, make oath and say as follows: On Sunday, October 18, 1914, while cruising with the Commodore T. who was in H.M.S. *Arethusa*, the *Ophelia* was sighted to the eastward, steering in a westerly direction, and the *Meteor* was ordered to board her. The *Ophelia* stopped on being signalled to do so, and I was ordered by the commanding officer of the *Meteor* to board her. On arrival on board I asked to be taken to the commanding officer. The surgeon in command was apparently unable to talk English at all fluently and the conversation was carried on through the master of the ship, who spoke good English and who interpreted my remarks to the surgeon in command and gave me his replies." The surgeon in command was Pfeiffer. He is in command, although there is a master, apparently separate from him, responsible for the navigation. This master was Captain Ridder, who had been a mercantile master, and who is a German. Continuing the affidavit says: "I requested to be shown the ship's papers. The surgeon in command produced certificates to the effect that the ship had been adapted for use as a hospital-ship, and that her name had been notified to the belligerent Powers. There were

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two certificates, one in German and one in French. They were both signed by the vice-admiral at Heligoland. I read the copy in French and requested the master to translate the copy in German, which he did. Both certificates were to the same effect, and appeared to be in order. I examined the ship's certificate "—that is, the ship's certificate as a merchant ship, registered in 1912. It is a screw steamer built of steel; distinguishing signal R.S.G.B.; length 68 metres; breadth 10 metres; depth 4 metres; and so on. The gross registered tons 1152, net 709. Home port, Hamburg. Now returning to the affidavit. Paragraph 4 of Lieutenant Peters: "I then questioned the surgeon in command as to the previous movements of the *Ophelia*. He replied that he had been ordered to proceed to position latitude 52° 51′ N. and longitude 3° 55′ E. and to look around.

"On my demand this wireless message was produced: it was written on an ordinary leaf from a signal pad. It was written in German, and of this I took a copy. I examined charts and the ship's log. I then questioned the surgeon in command as to what he proposed to look for.

"I suggested that he must have some idea of what he had to search for, and on my further pressing the question he said that perhaps he would find some dead bodies."

The message is: "Search 3° 55′ E. 52° 51′ N. and neighbourhood. (Sd.) Norddeich."

It is on a form which has got underneath the big printed German word for opened, then the German word for sealed, and the third one means "in code," and it is apparently intended that one or all of these words should be struck out in suitable cases. The affidavit goes on. Paragraph 5: "I then asked the surgeon in command how long he intended to remain in the neighbourhood of the named position to look around. He replied that he did not know. I then asked him if he would receive his orders to return by wireless telegraphy. He replied that he imagined he would receive these orders by wireless telegraphy. I did not ask for a code book as, if he had had one on board, it was hardly likely to be given to me." It is not proposed in the course of this case to call for the production of the code book, as it would not be fair as between one belligerent and

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another. By this time it is probably at the bottom of the sea. Paragraph 6: "The vagueness of the orders given to the *Ophelia* as communicated to me by the surgeon in command and the difficulty I experienced in getting the above information all led me to form the conclusion that the *Ophelia* was guilty of rendering unneutral service either by (1.) transmission of intelligence in the interests of the enemy, or (2.) improperly carrying warlike stores. To satisfy myself concerning this reason marked (2.) I decided to search the ship. I accordingly told the surgeon in command that I wished to search the ship. I examined all compartments, cabin, holds, &c., and found nothing at all of a suspicious nature. In the after lower hold was a quantity of sand ballast between 10 to 20 feet deep, which might possibly have concealed warlike stores. This I considered unlikely. The ship appeared to comply in all respects with her papers. I could find no code book. On conclusion of the search I returned on board H.M.S. *Meteor* and made my report to the commanding officer stating my suspicion of the *Ophelia* being guilty of rendering unneutral service for the reason marked (1.). The commanding officer of the *Meteor* sent a wireless telegraph message to Commodore T. requesting instruction, and as a result I was ordered to return on board the *Ophelia*, disable her wireless and order her to follow the *Meteor*. I carried out these instructions, made a note in the log of the *Ophelia* to the effect that I had disabled her wireless and that her orders were to follow the *Meteor*, and then I returned to the *Meteor*. This concludes my statement of the boarding and capture of the German hospital-ship *Ophelia*. I did not muster the crew. The report concerning the names on the cap ribbons of the crew was made subsequently by the acting gunner (T.)—Mr. C. E. Finch—of H.M.S. *Meteor*, who was placed in command of the *Ophelia* by the commanding officer of H.M.S. *Meteor* for passage from Yarmouth to Sheerness, during which passage the *Ophelia* was escorted by H.M.S. *Meteor*. I did not have any conversation touching the wireless log with the surgeon in command of the *Ophelia*, but subsequently on looking through this log on board H.M.S. *Meteor* I could find no trace of the signal ordering the *Ophelia* to proceed to the named position referred to above. This fact I pointed out

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to the commanding officer of the *Meteor*, who on examination of the log found it to contain only weather reports and extracts from newspapers." So that as far as this witness is concerned he could not find in the wireless log any entry of this order 52° 51′ N. 3° 55′ E. But that there is such an order is quite clear. There is the order to look round, or as it is put "to look around," in 52° 51′ N. 3° 55′ E., and according to this affidavit the person who is in command—the surgeon in command—does not apparently know clearly what it is for, though afterwards he thinks it is to see whether there are dead bodies. How long were they to look round? what were they to do next? and finally the order—whatever the order is—is not in the wireless log at all.

At any rate there seems no doubt that the order was given, because there is the message, and it cannot refer to any other time, because this was the only time that this vessel was in that portion of the North Sea.

The other affidavit, which it would be well to read before returning to the log, is the affidavit of Lieutenant-Commander Avison Scott, who is in command of torpedo-boat destroyer *Lawford*. "On October 18 last I was in command of His Majesty's torpedo-boat destroyer *Lawford* when on patrol duty in the North Sea. At 1.30 P.M. or thereabouts on that day I received a report from Leading Telegraphist James Alexander Cox, the wireless telegraphy operator on board the said ship, that a German ship with call sign 'D.O.P.' was making code messages and that by the strength of the signals he judged the ship to be in our vicinity. At that time H.M.S. *Lawford* was in latitude 52° 56′ N., longitude 3° 50′ E., which is about 30 miles distant from the nearest land and a considerable distance from any German territory. The sea was smooth and the weather rather hazy. Almost immediately after the above report had been made to me a ship was sighted at a distance of about 6 miles, which proved to be the German hospital ship *Ophelia* and which was found to be fitted with apparatus for wireless telegraphy." Further down the affidavit continues: "Being on patrol the sharpest possible look-out was kept continuously"—he means on board the *Lawford*—"but we saw no other ship that day fitted with

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wireless telegraphy apparatus (except ships of His Majesty's Navy which were not using a 300 metre wave). . . . . Before the *Ophelia* was sighted it had been recorded by the leading telegraphist that the signal was being answered by the Norddeich (a German) station, and the next evening about 9.45 P.M. it was reported to me that the Norddeich station was again calling up 'D.O.P.,' and it may be inferred from this that the intercepted message was coming from the *Ophelia*." Mr. Cox's affidavit, No. 5, runs thus: "I, James Alexander Cox, leading telegraphist, O.N. 23,5824, of H.M.S. *Lawford*, make oath and say as follows: I am the wireless telegraphy operator on board H.M.S. *Lawford*. I went into the wireless office on board the said ship, which was then on patrol duty in the North Sea, on Sunday, October 16 last, at about 1.20 P.M. I placed the telephone receivers for the reception of wireless messages to my ears and searched for signals. I immediately heard a very loud signal in code on the 300 metre wave, and from the strength of the signal I judged that it must have been transmitted from a ship which was not more than 10 miles distant. I did not hear the beginning of the message, but I took in and recorded all the rest of the message from the time I first picked it up to the end. The message concluded with the commercial finish sign 'A.R.' followed by the ship's call sign 'D.O.P.' On receiving the end of the message I continued to listen for further signals, and immediately heard an answering signal from 'K.A.V.' (which I know to be the call sign of the Norddeich station) calling up 'D.O.P.' and apparently answering or indicating the receipt of the foregoing message. I heard no further message from the ship with call sign 'D.O.P.,' and this tends to strengthen my opinion that the signal from 'K.A.V.' was intended as an acknowledgment of the previous signal set out in paragraph 1. . . . . I believe the message intercepted by me and set out in paragraph 1 hereof to have been in a German code for the following reasons: (*a*) The answering signal, or what I took to be such, came from a known German station. (*b*) The call letters indicate a ship of German origin, as the vast majority of German ships that carry wireless apparatus have call letters beginning with the letter 'D.' (*c*) The code struck me as being

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similar to codes I have heard the Norddeitch station using from time to time. (4) At 1.30 P.M. on the same day I reported to the captain of the ship, Lieutenant-Commander Arthur Avison Scott, that a German ship with call sign 'D.O.P.' was making code messages, and that by the strength of the signals I judged the ship to be in our vicinity. A very few minutes afterwards I heard that a ship had been sighted, and this proved to be the *Ophelia*, a German hospital-ship. (5.) I have since learned that the *Ophelia* was fitted with apparatus for W.T., and judging by her distance from H.M.S. *Lawford* when reported, and comparing the same with the distance at which I estimated the ship which was sending the signals to be, I am firmly of opinion that the message which I intercepted was transmitted from the *Ophelia*."

It may be convenient here to interpose the affidavit of Deputy-Surgeon-General Macnabb: "I, Daniel Joseph Patrick Macnabb, of the Admiralty, Whitehall, in the county of London, make oath and say as follows: I am Deputy-Surgeon-General of His Majesty's Fleet, and as such I am familiar with hospital-ships and their fittings, and am also well acquainted with the duties they have to perform, and with the requirements under the Hague Convention. I visited the *Ophelia* and inspected her with other officers on October 20, 1914. I have read the following affidavits which have been filed in this action:—(*a*) Affidavit of Commander E. J. K. Newman, R.N." (This will be read after reading the log.) "(*b*) Affidavit of Lieutenant-Commander Arthur Avison Scott, R.N." Then paragraph 4: "I am familiar with the functions and duties of a hospital-ship. (5.) In my opinion the conduct of the *Ophelia* was inconsistent with the functions of a hospital-ship in the following respects:—(*a*) In fleeing from submarine *D.* 4 on October 8, 1914, apparently to avoid search. (*b*) On the same occasion in not hoisting the national flag with the Red Cross flag, and in hoisting a flag on the ensign staff, which was not the national flag, contrary to paragraph 4 of art. 5 of the Hague Convention No. 10. (*c*) In sending and receiving a wireless signal in code on October 18 and also in not entering such signal in her wireless signal log." The point there is not that she sends a wireless message, because a hospital-ship may have to receive or send a wireless message as much as

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any other ship, but the point is why in code? "The medical officer in charge of a hospital-ship ought to make sure that no signals of any sort are made by a hospital-ship without his knowledge and without such signals being entered in the signal log. (6.) When I visited the *Ophelia* on October 20, 1914, I observed that the naval portion of the crew, acting under the medical officer and performing the duties which, in a hospital-ship belonging to H.M. Navy, are carried out by sick berth stewards assisted by naval ratings, were dressed as bluejackets, and when ordered to carry out a drill for embarking wounded by means of derricks they went about their work, which involved the handling of ropes and blocks, in a manner characteristic of trained seamen and not of sick berth stewards. The drill was conducted by a petty officer who regulated it by a boatswain's whistle. . . . . This portion of the crew was quite distinct from the mercantile crew under the master who were used for the navigation of the ship. They also wore caps with cap ribbons, some of which bore the words 'Werft Division 1.4,' and the remainder bore the words 'Torpedo Division 5.1.' I am informed and believe that the Werft Division and Torpedo Division are two of the divisions into which the personnel of the German navy is divided."

Returning now to the log we find that on October 9 the vessel was at Hamburg, and at 7 o'clock in the morning she weighed anchor. 7.40, pilot left the ship. On the 11th she was at the Norderney Lightship. She takes on more pilots. 5.30 in the evening she is at Cuxhaven. At 7 she is off the Oste Riff Lightship, and she anchors off Brunsbuttel. This is the first place we started from. It is on the margin of the chart. This is on October 9. On October 10, 6 o'clock, weighed anchor; steamed to Hamburg. She is at Hamburg for five days. While she is at Hamburg there is an entry in the log, Monday, 12th—the last entry: "Inge and Sommer, Stoker Thannhauser, were paid off. Seaman Siegel was not on board to-day, the masts were lengthened." Presumably that is in order to improve her wireless range, or to assist the effectiveness of the wireless apparatus on the ship. "Ship was painted, hold dry." Then Tuesday, 13th, she is still at Hamburg. Various seamen are being dismissed, that is to say,

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men are paid off and others are added to the complement of the ship. Then: "Carried out duties on board." Thursday, 15th: "Steamed down the Elbe under direction of pilot"; but there is no entry in the diary as to receiving orders or anything of that kind. A ship of this sort is not an automaton. It leaves Hamburg for some reason; but there is nothing in the log to show why it left Hamburg or where it is going to. Friday, 16th: "Sea watch, weighed anchor, continued voyage." Where are they going to—where is the direction of what they are going to do? At 7.35 A.M. they pass the Elbe 2 Lightship, "log heaved."

The log stops at 7.35 A.M. Friday, October 16, this vessel having been caught in the North Sea at 3 P.M. Sunday, October 18. But while that is so, there were found on board some loose sheets which are probably the notes from which the log is intended to be written up, and those loose sheets are included in that which the translator has translated for us.

On Sunday, the 18th, in the afternoon the *Ophelia* was boarded by Lieutenant Peters; he made an entry in the ship's log—the Hague Convention requires it. He made a note in the log to the effect that he had disabled her wireless and that her orders were to follow the *Meteor*, and he then left. These loose sheets are quite obviously torn out of another book; they are sheets which have been torn, and one would have said if not so hastily at least so carelessly that they have actually not been careful to tear off everything that has been written, and they are consequently torn out of a book of which they formed part when the writing was made. It is not that you tear sheets out of a book and use those loose sheets to write on, but it is that some one has been writing in this book after they have torn these sheets off. There is an entry "At 10¼ P.L. passed the South-West Buoy, anchored at 10¾ in Southern Harbour, Heligoland." If that had happened which ought to have happened then there would have been copied into the fair copy log—the proper log—the whole of what one has on the last sheet for the Friday. Whether they were interrupted in the middle of it or whether they stopped halfway through is not known; but lower down on the same day if you look at the original you will come to Saturday, the 17th: "Wind, north-east 6, rather cloudy," and so on. It is perfectly clear

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when you look at this that that has been torn out of the book into which it had been written, because you do not even get the beginning of the word "Saturday"—you only get the end of it. Possibly these two sheets were torn out of a scrap log-book—a rough log-book, or scrap log as it is sometimes called; but it is a matter for observation that when we went aboard the ship, which we did within a very few minutes, the scrap log-book is not to be found, but all we do find are these two loose sheets. On the 18th in the last sheet you find soundings taken on the 1 o'clock line; then "3.30 P.L. 72, *Meteor* stopped us." Then opposite 5: "6 o'clock, steamed behind her. Wireless apparatus removed." They apparently must have kept these sheets, at any rate of the rough log, on board the vessel after capture, and indeed until October 20, which is the Tuesday. The second rough sheet, beginning with Monday, October 19, runs: "Continued to steam behind torpedo-boat. 8.30, Cockle Lightship. 9, naval officer as pilot steamed to Yarmouth Harbour. 9.30, anchored B.G., 45 fathoms chain outside S. Nicholas Lightship, Yarmouth Pier S.W. by W. $\frac{3}{4}$ W., 8 feet water. Sea watch. Hold, dry. Soldiers came on board for watch. Under military guard." Then the following entry is "Followed *Meteor* southwards." She was taken to Sheerness. It may be as well to call attention to the other ship's papers. In addition to the log, the two loose sheets of what may have been the scrap log, and in the handwriting of the first mate, Kruger, now interned in Jersey, there is a wireless log, and there is the engine-room register, and there is a muster roll. The muster roll goes back to 1912. It has got the names of everybody on board as far as we know. We have only just taken out some names which appear to have been those of people who were on board at this time. They appear to have copied out everybody's name added to the ship after August 10—that is the day on which the ship is recorded as being refitted as a hospital-ship. What is a little striking about it is that as from August 10, which was the day when the ship was refitted as a hospital-ship, it would not appear that anybody had been added to the ship on the ground that he is a person skilled in looking after the sick. Engineers, stokers, and seamen are added, but apparently no addition after August 10 of

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anybody who may be expected to be connected with hospital work. Then there is the engine-room register. Voyage from Schillinghorn roadstead, in the Western Ems, where she is supposed to be going from the Schillinghorn roadstead to the place of disaster. It comes twice over. Just above p. 9 is written another extract: "Voyage from Schillinghorn roadstead to place of disaster." That undoubtedly has a bearing on the entry which is in the log of October 8, 6 A.M.: "On the look out for a sunken torpedo-boat." If you compare the log of October 8 with the engine-room register you will see in the log "6 o'clock weighed anchor; 6.50, under instructions from the pilot, steamed out in the Ems guided by landmarks. On the look out for sunken torpedo-boat." If you look in the engine-room log you will see that between 6 and 7 you do get "anchor weighed," and then after that the ship is under way. It looks very much as if the pilot was the person who was supposed to know what the ship was going to do or what it was for, because they always seem to speak about instructions from the pilot. This is at the time when the submarine *D.* 4 was watching her. This is what she was doing on October 8: "10.12—which is in the morning—stop. 10.13, full astern. 10.14, stop. 10.16, full astern. 10.18, stop, full astern. 10.20, full ahead. 10.23, stop, full astern. 10.24, stop. 10.25, slow ahead. 10.26, half ahead. 10.27, stop. 10.28, full ahead. 12.52 P.M., slow ahead. 10.28, full ahead to 12.52." This has a bearing on the submarine *D.* 4's observation that when this vessel caught sight of the submarine she bolted. It may be said perhaps that the records between 10 to 12 are the records of a vessel engaged in some kind of search, because she is stopping and she is going back, but at any rate from 10.28 full ahead and thereafter to 12.52 she is simply going as fast as she can, which seems curious, for, having gone for the purpose, as is suggested, of searching for a sunken submarine, and having searched for 18 minutes, she goes full ahead for $2\frac{1}{2}$ hours. On p. 7 will be found what she was doing on October 18 very early in the morning. She stops and then she goes half astern and stops full ahead between 2 and 3 in the morning. That is when she is taking soundings. The same thing happens three times over. I suppose the vessel was being pulled up in connection

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with taking soundings. When you come to the afternoon at 12.52 p.m.: "Stop, half astern and soundings taken again." It is clear weather on this day, and it is difficult to suppose that she was taking soundings to find out her position. It may be suggested that she was taking soundings to see if she comes on something which is a submarine. Then there is the entry: "3.17, Stop. English T.B. alongside"—that means torpedo-boat alongside. The next document is a translation of the wireless log. It will not be necessary to read it, for the reason that there is nothing whatever in it except what are called Press reports, and the point is not what is in the log, but what is not in it. It is curious that this vessel in using her wireless apparatus, both receiving and sending messages, sometimes in code, is getting into it extracts from German newspapers. The translator's affidavit states that: "I have perused the whole of the wireless telegraph log. The first entry is under date October 7, 1914, and the last entry is under date October 18, 1914." So that it covers both dates which are important: "It contains no entries of any messages sent; and the whole of those received which are entered in the log appear to consist of the German bulletins sent by wireless telegraphy." One entry has not yet been noticed, and that is "Wireless message from *Würtemberg*—that is the name of a ship—to auxiliary hospital-ship *F*." For some reason this is called "sealed." Then "7 P.M., October 17, 1914." The translation is: "Go at once to Haaks (Finger) Lightship. Further instructions to follow." The signature is a very odd one, "Trop Chef," or "Tross Chef." There of the three words at the top two are struck out, and the middle one is left in. If you look at the chart you will find this "Haaks Finger Lightship" is to the east of the last point of the course almost exactly on the same line, 53 degrees of latitude. It is just half way between the point where the ship stopped and the Texel. It is to that point it would appear that this vessel had been directed to go by this message of the 17th received at 7 P.M.: "Go at once to Haaks (Finger) Lightship. Further instructions to follow."

There is one more affidavit, which will finish the materials to be brought to the attention of the Court—the affidavit of Commander

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Edward John Kendall Newman, of the Royal Navy, and he says: "I am transport officer in the Royal Albert Docks. Since the war I have been responsible for fitting out several hospital-ships for the Royal Navy, and I am therefore well acquainted with the requirements according to Admiralty specifications for service hospital-ships. (2.) I made a thorough inspection of the *Ophelia* on December 9, 1914, as she was lying in the South-West India Dock, London, with the object of ascertaining whether she was suitable for use as a hospital-ship." The next sentence is perhaps significant: "I was then under the impression that I was examining her with a view to the British Government taking her over as a hospital-ship." We thought it just as well that he should not know, and he did not know, that she was captured, or anything about her, but he was just asked to make a report upon her to say whether she was suitable for use as a hospital-ship. "On the same day I made a report that she was 'quite unsuitable' for the purposes of a hospital-ship. (3.) My reasons for that opinion are: 1. Absence of scuttles or port holes for purposes of proper ventilation and light, and lack of room in the hospital wards. 2. Lack of sanitary conveniences. 3. Want of accommodation for medical and nursing staff. (4.) There are two hospital wards, one forward and one aft, and both on the main deck. There is only one entrance to each ward. The forward ward is 40 feet 7 inches long by 31 feet 6 inches wide. The height from deck to deck is 7 feet. The height between the top of the hatch leading to the lower hold"—that would be below the level of the wards—"and the bottom of the coaming or hatchway leading to the upper deck is 5 feet 3 inches." So that that would be 5 feet 3 inches heading. "This hatchway measures 29 feet 9 inches by 11 feet 2 inches, and this is the only clear floor space in the ward. There are no side scuttles or port holes for ventilation and light. The iron deck is unsheathed and not covered. The skylight and the hatch giving entrance to the ward from the upper deck are the only means of ventilation, and the ventilation is certainly insufficient. There is no sanitary convenience of any kind in the forward ward. The nearest sanitary convenience is on the bridge deck under the upper bridge deck. There is no accommodation for any of

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the hospital staff in the ward or any conveniences, except one cupboard. There are no chairs, but one table. There is no cold water laid on. The cold water would have to be brought from the bridge deck. There is one zinc bath in this ward. It is very roughly fitted against the bulkhead of the operating room and at the foot of two rows of cots. It is fitted with hot water only. There is also a spare operating table in this ward. (5.) The after ward is abaft the engine-room and the forepart is divided by the engine-room casing, which occupies the middle of the forward part of the ward. The only floor space available is the top of hatch 25 feet 8 inches by 11 feet 2 inches. . . . . The height to the upper deck is 6 feet. This deck is bare iron, and the only access to the ward is by an ordinary hatchway leading to the upper deck. There are no sanitary conveniences nearer than the upper deck, but there are two wash basins and a zinc bath fitted for hot water only. The forward part of this ward is pierced and sixteen 8 inch scuttles are fitted and two 12 inch ventilators to bridge deck. These form the only ventilation with the exception of the companion ladderways leading to the bridge deck. There is an 8 feet 6 inches by 7 feet 8 inches skylight to the after ward and one 12 inch ventilator to bridge deck. This ward is sufficiently ventilated in the forward part, but not in the after part. There is no accommodation whatever for the staff in the after ward, and no chairs, cupboards, or tables are provided, but there are some cupboards with linen in them and a few camp stools. (6.) The only way of getting wounded or sick persons into either ward if they cannot walk would be by taking the hatchway off and hoisting them up by the derrick, and that is also the only way by which they could be carried from the after ward to or from the operating room. The sick berth staff could only be accommodated in the steerage. There are in the steerage two rooms which contain ten open berths two tiers high in one row. Also a mess table. This accommodation is very rough, and quite unsuitable for the sick berth staff. There is no accommodation whatever for nurses. (9.) The funnel has been lengthened about 10 feet, and attached to the funnel near the top there are four brackets, two on each side of the funnel, and each carrying

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two pairs of signal halyards. . . . . The funnel has been lengthened and the brackets fitted to the lengthened portion of the funnel as high as possible, and these alterations have in my opinion been specially made for hoisting lights and flags for signalling purposes. It is right to point out that there is a red cross on the funnel, but it seems clear that the red cross would not be visible at night unless there was something to illuminate it. On each side of the funnel were stowed on hooks a number of signal flags, obviously kept there for immediate use. These flags are not the international code signal flags, but special German flags. There is also a set of international code signal flags, such as are usually carried by merchant ships. These were in the locker in the charthouse, which is where signal flags are usually kept in merchant and in hospital-ships. The *Ophelia* is 226 feet long. She is painted white with a horizontal band of green about a yard and a half wide. She has a white funnel with black top, and a red cross painted upon it on each side. (10.) The *Ophelia* has two masts. Both masts have been lengthened by a spar lashed to them, so as to make her (more) suitable for wireless telegraphy installation. The masts are now both about 77 feet high. This is an abnormal height." Then paragraph 11: "Abaft the main mast she carried a derrick post with a small steel derrick capable of lifting weights of about 3 tons. This derrick will plumb overboard and also plumb the aft hatch. (12.) The only Red Cross flags I could find were two 10 feet 6 inches by 8 feet 10 inches, which were large for a ship of the size of the *Ophelia*. She had the following signalling appliances which are usually carried by passenger ships, namely: Very's pistols, Very's lights, flares, small signal rockets, blue lights, Holmes' distress flares, and life-buoy rescue lights. In addition to these appliances she also had on board ten large signal rockets which were unusually strong for signalling purposes and were very much better both in finish and manufacture than the signalling rockets usually carried in passenger ships. I am informed and believe that these large signal rockets were fitted for a steel tail or fan, but no trace of these fittings can be found on board." That is when he examined her. "The number of Very's lights

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carried was abnormally large. They comprised 600 green lights, 480 red lights, and 140 white lights." If they were giving the patients a firework display they would be very proper. "The number of Very's lights which according to Admiralty regulations are to be carried by a battleship or battle cruiser in H.M. Navy is only 100 green lights, 100 red lights, and 300 white lights, and the number to be carried by an auxiliary ship or corresponding ship should be 12 of each. (13.) The conclusion I drew from my examination of the *Ophelia* was that not only was she unsuitable for use as a hospital-ship but she was undoubtedly fitted and intended for signalling purposes. I came to this conclusion before I had any knowledge that the *Ophelia* was suspected of acting as a signalling ship and when I was asked to report on her suitability as a hospital-ship. No British hospital-ship is fitted with such elaborate means of signalling as the *Ophelia*." Then he identifies the photograph.

There is one further affidavit by Sir William Graham Greene, who is secretary to the Admiralty. It shows from the Admiralty records what were, so far as we know, the time and place of the two incidents in connection with which it is suggested that this hospital-ship was not doing proper work. He says: "(1.) I am secretary to the Commissioners for executing the Office of Lord High Admiral of the United Kingdom, and from information acquired by me as such secretary as aforesaid I am able to depose to the following facts. (2.) From records in the possession of the Admiralty one of His Majesty's submarines returned to Harwich, and thereafter reported before 11 A.M. on October 7, 1914, that she had sunk a German destroyer off Ems river at 11 A.M. on October 6." Then paragraph 3: "There is no record in the possession of the Admiralty of any other German destroyer or torpedo-boat having been sunk anywhere in the neighbourhood of the Ems or adjacent coasts by a British submarine on October 6, 7 or 8, 1914."

[THE PRESIDENT. According to the entry in the ship's log, they received orders on October 6 to steam out at once to the mouth of the Ems at 8.30 P.M. That would correspond. The German destroyer was sunk, this affidavit says, according to the report at 11 A.M. on that day. Having received orders to steam

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out at night to the mouth of the Ems, and after coming near some ship, they received a counter order and steamed back. That looks as though they were told it was too late; and therefore that would not account for their being there on the 8th.]

It certainly seems very late to be there. It seems so odd that on the 8th, having gone all that way for this purpose, they should be dodging about, as the engine-room log shows they were, for a few minutes, and then that they should take to their heels. They are searching about from 10.12 to 10.28. It does seem curious, in view of the loss at 11 A.M. on October 6, that this hospital-ship should return to port and then set out again, and then on October 8 should dodge about from 10.12 to 10.28, and then should steam full speed ahead back. Possibly those who are here may be able to give us some explanation.

Sir William Graham Greene goes on to say this in paragraph 4: "From records in the possession of the Admiralty four German torpedo-boat destroyers were sunk by some of H.M. ships between 2.20 P.M. and 4.30 P.M. on October 17, 1914, within a radius of six miles from latitude 53° 7′ N. and longitude 3° 40′ E. During and shortly after the engagement thirty-four survivors from the sunk German destroyers were picked up by some of His Majesty's ships."

Then there is the claim. It is "The claim of Johannes Valerius Christlees Pfeiffer, a naval staff-surgeon of the above-named ship *Ophelia*, a subject of His Imperial Majesty the German Emperor, at present under detention in the Officers' Prisoners of War Camp at Holyport, near Maidenhead, in the county of Berks, on behalf of the Imperial German Government, the true lawful and sole owner of the said ship, her tackle, apparel, and furniture, at the time she was taken and seized as prize by His Majesty's ship of war *Meteor*, A. F. W. Howard, commander, and brought into the port of Great Yarmouth." He also claims "Demurrage and all such loss, costs, charges, damages and expenses as have arisen and been incurred." Then the grounds are: "The said ship is a hospital-ship, that is to say, a ship equipped, adapted and assigned specially and solely with a view to assisting the wounded, sick and shipwrecked, having been officially commissioned by the

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German Government, and the ship's name having been communicated to the Governments of all the belligerent Powers through the official channels during the course of the present hostilities, and before the ship was employed as a hospital-ship pursuant to art. 1 of the Hague Convention No. 10. (2.) The said ship was formerly a trading steamer, and is registered at the port of Hamburg. The officers and medical staff took possession of the ship at Kiel at the end of August, and superintended her fitting out as a hospital-ship. She completed her fitting out at Wilhelmshaven, whence she sailed on October 6, 1914. (3.) The said ship as aforesaid and all her boats were before sailing, and until her capture, painted white outside with a horizontal band of green in accordance with the terms of art. 5 of the said Convention, and at all material times made herself known by hoisting her national flag and the white flag with a red cross as provided by the Geneva Convention"—our evidence does not support the suggestion about "at all material times." "She also has a red cross on either side of the white funnel. (4.) From the date of her departure from Wilhelmshaven until her capture as aforesaid on October 18, 1914, the said ship was engaged solely in affording or seeking to afford relief and assistance to the wounded, sick, and shipwrecked of the belligerents, and for no military purpose whatever. (5.) By reason of the matters aforesaid the said ship was under the said Convention exempt from capture."

There the matter stands. The British Government would be most anxious that every ship which is entitled to claim to be a hospital-ship should have the most complete immunity. If, as the result of this investigation, it appears that this ship is entitled to claim that immunity, the Court will know how to make the necessary order; but it is quite another matter to claim "demurrage and loss, costs, charges and expenses"; because, by the rule of this Court, in any event the captors are entitled to proceed on a case of suspicion—reasonable suspicion—and even in the event, if they were found not to be justified, no order is made for costs and damages and expenses, unless the Court comes to the conclusion that the ship should never have been detained in the state of facts as known to the captors. But that is not this case. The question which is of real importance

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here—a prima facie case being made against the *Ophelia*, for the reasons which are indicated in the affidavits—is whether the *Ophelia* discharges herself from the burden of that prima facie case made against her. If she does, we shall be concerned to see that she is restored to her rightful status without a moment's delay.

Leslie Scott, K.C., *Leck, K.C.*, and *W. N. Raeburn*, for Staff-Surgeon J. V. C. Pfeiffer, claiming, on behalf of the German Imperial Government, the release of the hospital-ship *Ophelia*. The case for the Crown has been stated with moderation and fairness. It is said, however, that inferences adverse to this vessel ought to be drawn because of certain facts. Those facts seem to fall under four heads: first, that the ship was not adapted or used solely for hospital purposes within the meaning of the Hague Convention; secondly, an affirmative case, that the ship was used for military purposes; thirdly, that on a specific date she sought to evade search, namely, on October 8; fourthly, that there are certain facts which require explanation, such as the absence of certain records and so on.

The whole case is one of mere suspicion, and none of the facts stated in any of the affidavits either cumulatively or alone are sufficient to justify that suspicion. A very strong case is required to prove so grave a departure from international duty as would be involved by the use of a hospital-ship for military purposes. The Hague Convention, which applies the Geneva Convention to maritime warfare, does not require that a hospital-ship within the meaning of that Convention should be any particular kind of hospital-ship. The Convention extends to hospital-ships of all kinds, whether they are elaborately fitted or whether they are ill fitted, whether they have a good medical staff on board or an indifferent medical staff, whether they are hospital-ships upon which patients could remain as in a hospital on land for a long time, or whether they are merely what may be called sea ambulances, ships designed for the reception, in the first instance, of wounded but not for keeping the wounded long on board, ships designed for carrying off the wounded to hospital-ships of a more permanent character, or into port for the purpose of their transference to

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land hospitals. To all classes of ships the Convention applies. This ship is not fitted as a hospital-ship of the type upon which it is intended that the wounded shall remain for a long time and undergo a long course of hospital treatment. The ship was merely an auxiliary hospital-ship, a ship designed for the collection of the wounded or those suffering from shock from immersion in water and carrying them to a base. The question whether the appliances on board were the best or not the best is quite irrelevant; but according to our instructions, the arrangements, having regard to the purposes for which the ship was intended, were as good as they could be. With regard to the construction of the ship, if it were a ship intended for prolonged treatment, then the question of construction would be ground for considerable criticism; but if the vessel is regarded merely as a sea ambulance for the reception of the wounded, and keeping them for a short time and then taking them on to a permanent hospital, obviously such criticism has very much less weight. The Court is asked to bear in mind that the vessel was when in use designed for, and intended to be used as, an auxiliary hospital-ship of that type. Then it is said that the presence on board the vessel of a large supply of artificial lights for signalling purposes was inconsistent in some way with its use as a hospital-ship. It is difficult to understand the ground upon which that inference is sought to be drawn.

[*The Attorney-General.* The suggestion is this: If this ship was designed to be used for signalling purposes one would expect to find on her an abnormal number of lights and signalling apparatus, whereas if she were a hospital-ship she would only need signals in the event of distress. That is the point.]

Considering that she had a wireless installation on board, and that military signalling of a military character is done by wireless, it is not easy to see the force of the observation. She had no searchlight, and no means if she wanted to go out at night to rescue drowning people in the water of finding them by means of searchlight. A large supply of lights of this kind is the only alternative method for the purpose of picking up people in the water at night, and for her to have signalling facilities on board is not in the least inconsistent with the use of the ship

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as a hospital-ship under the Geneva Convention or the extension of it by the 10th Hague Convention, which expressly authorizes the installation of wireless apparatus on board. It is quite obvious that in order that a hospital-ship should be of efficient use for hospital purposes it must be possible to summon her by wireless. It is said that the funnel was lengthened and that the masts were lengthened, and that those matters had to do with her signalling. In fact, the funnel was lengthened in the year 1913, when she was purely used as a commercial ship for commercial purposes. The masts were lengthened at Hamburg during the war, and that is entered in the log. The reason why they were lengthened was because it was found that the wireless apparatus stretched between the masts was too low, as it was, and—as the Attorney-General stated—that alteration was made about October 12 for the purpose of facilitating the wireless apparatus being used. The small fastening apparatus on the funnel was used for the signal halyards for the German flags that were kept on hooks in the usual way—the ordinary flags used in the German Navy for auxiliary hospital-ships, and so on. There were on board also the ordinary mercantile flags of the international code. The use of the particular set of signalling flags is, it is submitted, precisely on the same footing as the use of a code for the purpose of signalling with her wireless installation. With regard to that the position is this. In the German service the non-combatant vessels are given a secret code for use which is not the same as the secret code used by the combatant vessels. It is obvious that a secret code must be used, because it is necessary to give instructions to hospital vessels, for instance, to go to certain places either before an intended engagement or after an engagement which has taken place. If those messages were given en clair very important pieces of information could be picked up by the enemy which would have a military value. Taking the simplest possible instance and applying it to the British Navy. The British Navy has information that the German ships are likely to come out on a certain day for a certain purpose in a certain direction. Arrangements are made to meet that. It is expected that a serious engagement will take place. It is desired that an

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auxiliary hospital-ship of this type should be somewhere near the scene of the battle. A message is sent to the particular hospital-ship to go to sea out in the North Sea. Supposing that message were sent not in code and was picked up by the German Navy or the German wireless station, obviously that would give the German Admiralty a piece of information which might be of great value. This question must have been present to the minds of the representatives of the different nations who discussed the subject-matter of the 10th Convention, and when it was provided in that Convention that hospital-ships should have a wireless installation on board it would have been easy to say that the messages must be sent in plain language. Had it been the intention of the Convention to forbid coding, obviously a veto would have been inserted in the Convention ; but it is not forbidden in the Convention, and there are obvious reasons why it must be desirable as an ordinary practice to send messages in code; so no adverse inference is possible from the fact that a given message was sent in code. That is the explanation of why the message was sent in code on the 18th from the *Ophelia* to the Norddeich station asking for instructions. Staff-Surgeon Pfeiffer can explain the gist of the message he sent. It was this. At 7 P.M. of the 17th he had received a message from the naval authorities—the *Würtemberg* is the name of a ship carrying the flag of the Admiralty which sent the message—to go to the Haaks Lightship. As appears quite plainly from the engine-room log at 7.27 the vessel started on her voyage in pursuance of that order. That order was to this effect: "Go at once to the Haaks (Finger) Lightship. Further instructions to follow." The next day, not having received any further instructions, at somewhere between 1 and 2 o'clock Dr. Pfeiffer telegraphed by wireless to Norddeich asking for further instructions, and he got the answer of the other wireless message, which is undated: "Search 3° 55′ E. 52° 51′ N.," somewhere about 2 o'clock, and the position 3° 55′ E. 52° 51′ N. is about 10 miles nearly due south at the end of the line plotted on the chart of the advisers of the Crown.

[THE PRESIDENT. Can you tell me whether these courses are true or magnetic?]

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The variation there is 12 degrees. Perhaps the Attorney-General could tell the Court whether the gentleman who plotted those courses took them as true or magnetic?

[*The Attorney-General.* I am told they were taken as magnetic. I do not know whether that is right or not.]

Instructions are given in the German service to all hospital-ships alike. All hospital-ships alike are furnished with the secret code, which is not the same as the secret code of the fighting arm of the service. All hospital-ships have the same instructions, that they are not to allow either the code, or the record made of code messages, or the instructions to get into the hands of the enemy. That, of course, is an obvious corollary of the fact that secrecy is necessary. Those instructions are the same instructions that are given to what are called auxiliary ships—that is to say, non-combatant ships. That is the explanation why there was no secret code found on this vessel at the time she was searched, and why there was no wireless log containing these messages, and why the instructions themselves were not there. The secret code and the wireless log containing the secret code messages and the book of instructions as to what they were to do in the matter were thrown overboard, as the instructions were not to let messages in code get into the possession of the enemy. There were other matters of a secret character which for obvious reasons could not be allowed to get into the hands of the other belligerent, but were instructions absolutely essential to the performance of their duty by the crew of the hospital-ship; for instance, as to the position in which there were mine areas. All the details of the German mine areas were imparted to the commanding officer of the vessel, so that he might avoid being blown up—instructions which the Court will agree were reasonable instructions for the German Government to give to its own vessels. The details of the mine areas are now with the other documents at the bottom of the North Sea. It will be observed that there is nothing in any of those matters that can be of assistance to the German Government in the carrying on of the war. That the use of hospital-ships is capable of abuse is a platitude; it is obvious. A hospital-ship may be used by any belligerent for the purposes of belligerency—fraudulently and

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improperly used—but our respectful submission is that none of these matters justify the inference of any intention to abuse the use of the hospital-ship, or of any abuse in fact. These are facts not within the possession of the British Admiralty, and are now put before the Court for the first time.

The second heading of the case for the Crown was that the vessel was in fact adapted and used for military purposes. It is difficult to find in the evidence any fact upon which it could be said that the vessel was capable of being used for military purposes, except the fact that she was equipped with signalling apparatus, wireless and lights. That she was capable of being used for military purposes for those reasons is quite clearly the case; but that is equally true of every hospital-ship there is that has a wireless installation on board. The only other point made for the Crown on that head is a point upon which nothing at all really needs to be said except one sentence, and that is as to the derrick attached to the after mast, which it is said was able to lift a weight of three tons and plumb the after hold, and also over board. That was the ordinary commercial derrick on the ship when she was used as a mercantile ship for ordinary cargo purposes. Since she was converted to be used as a hospital-ship that derrick has been lashed to the mast, and so remained lashed, and has never been used. For hospital purposes it was of no use.

With regard to the fittings, the alterations to fit her for a hospital-ship continued all through August. The last entry as to alterations is on August 29. Then the hospital rooms were painted on September 1. The hospital was painted on September 2. Then on September 4: "Received linen and mattresses for hospital beds." Then September 5: "Everything seen to in hospital." Then on September 6 she is inspected by the fleet surgeon. On September 8 "the crew painted the ship's side"—that is the green band and white side. Then the naval crew were given hospital drill on September 12 and 13. She is not certified as a hospital-ship till Friday, the 11th—that is, she was not announced by the German Government as having been fitted as a hospital-ship till September 11.

[THE PRESIDENT. What is called the certificate is an

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advertisement which is bound to be given under the Hague Convention before she can proceed as a hospital-ship.]

There is no importance in this point beyond this one thing—that elaborate alterations were made for the purpose of fitting her up as a hospital-ship. On October 6 in the evening it is entered in the log that they received orders to steam at once to the mouth of the Ems. That order was received by Morse code by flashlight. Then it was countermanded; and then they received the order to go and look for the sunken torpedo-boat. If, as is the case, the vessel had been sunk in the neighbourhood of the mouth of the Ems, the reason is seen why the vessel *Ophelia* was there, and why she was sent there. On the 8th (on p. 5 of the log) you will find: "Weighed anchor at 6.50 and, under instructions from the pilot, steamed out of the Ems guided by landmarks." "Instructions from the pilot" means taking the courses from the pilot as he gave them, steering by land all the time. The point is this. It is said that our movements on that day were suspicious. The answer is that there is not a single entry in the log justifying any suspicion at all. The torpedo-boat had been sunk, and the vessel is sent to look, and the log merely says she goes into the Ems and passes Borkum at 4.45 on the 7th, when the patent log showed 37 knots, and then at 6 o'clock 44 knots. That is all there is there. At 6 the next morning it says: "Weighed anchor and proceeded out of the Ems." The courses plotted on the Admiralty chart have no interest, except as showing a series of very elaborate zig-zags backwards and forwards, which cannot be traced by any of the documents in the case.

The explanation given by our witnesses is that they were engaged in looking about to see whether they could find any person or any sign of the sunken torpedo-boat, and that they sighted a submarine, as entered in the log, and that submarine did not signal to the ship to stop, and that there was no reason why the hospital-ship should pay any attention at all to the submarine. What she did on that day was this. She steamed out from the Ems in a westerly direction, and then took a series of zig-zags north-west and north-east, and then turned eastward coming round on a course making a certain amount of southing at

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the same time, because there was a drift as a result of the prevailing westerly winds of the two previous days that might have caused any survivor clinging to wreckage from the torpedo-boat to have drifted in an easterly direction, and coming round in that way she hoped that she might pick up any that were about. What it is desired to emphasize is that those on board were absolutely unconscious of any wish on the part of the submarine, which they sighted 7 or 8 miles away, that they should stop. Why the officer in command of the submarine should imagine that the hospital-ship should stop when he did not ask her to do so, or should desist from the work upon which she was engaged without a request to wait for a visit, it is difficult to see.

The next point is that it is stated in Lieutenant-Commander Moncrieffe's affidavit that the *Ophelia* was carrying a flag that was not her national flag. That is not correct; she was flying her German national flag and Red Cross flag all the time at the proper places.

The other point is this: the commander of this submarine, Lieutenant-Commander Moncrieffe, says in paragraph 3 that she had altered her course to the northward. At some time of the day she did alter her course to the northward for the purpose of these zig-zags. He says: "I accordingly altered the course of my submarine to east, speed 8 knots, in order to close on her." Then in paragraph 5 he speaks of her making black smoke and beginning to increase her speed. "I increased speed to 11 knots." He says in paragraph 7: "She appeared to increase speed by about 2 to 3 knots." I may say her greatest speed was 9 to 10 knots. If he were going 11 knots she could not have run away from him. Her records are indicated by the patent log; they mostly work out at between 8 and 9 knots. Our submission is that this witness has drawn a series of baseless inferences. He was a long way off; and a submarine is not the best of all, probably it is the worst of all, places at sea from which to get accurate observations of vessels at a considerable distance. He says: "The steamer quite unmistakably fled from me." In that he was jumping to conclusions which were quite baseless. If the Court finds that the course of the vessel was what is stated by our witnesses—which does not appear to be logged because there was

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no particular reason to log it, and is nothing like either what is plotted on this chart on behalf of the Crown, or what is stated by Commander Moncrieffe—then there is an end of his inferences.

There is one more observation to make on Lieutenant-Commander Moncrieffe's affidavit, paragraph No. 10: He says "In my opinion the *Ophelia* was engaged in scouting; and the reasons for that opinion are: (1.) Her alterations of course, which I have described"—those alterations of course which he has described are radically inconsistent with the alterations of course plotted by the Admiralty on the chart.

This comment on the affidavit of Lieutenant-Commander Moncrieffe is important. He is describing what he saw, or what he thought he saw, and what he thought on that morning of October 8. His evidence must be judged by the knowledge which he then possessed. He did not know of any torpedo-boat having been sunk in that place at that time; and he says in No. 1 of his reasons: "There was no reason for them"—that is, the alterations of course—"connected with ordinary navigation, such as the avoidance of shoals or mines." It is not suggested that there were. Then he says in paragraph 11: "I am quite certain she was not searching for a sunken torpedo-boat, or any sunken vessel." That paragraph is a statement made by him after he has received information, and before he makes his affidavit, that it is stated that she was searching for survivors from a torpedo-boat. If we succeed in disposing of that, it is submitted that we dispose of everything to which the word "suspicion" can possibly be applied. Supposing the whole of Lieutenant-Commander Moncrieffe's affidavit had been true, even then that is no case for anything more than asking questions as to why she was doing what she was doing on the 8th. The moment the answer was given, "Because we had been told to look for survivors of a torpedo-boat," it is submitted that that would be a complete answer and prevent any case being properly brought in the Prize Court.

Passing now to the evening of the 17th. As regards that there is really very little to be said. The moment that one puts out of one's mind the idea that because there was a wireless

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signal in code the next day that should raise any suspicion the facts are quite simple. A disaster takes place on the 17th. Four torpedo-boats are sunk by British cruisers or torpedo-boats.

That knowledge goes to the German Admiralty no doubt almost at once. At 7 P.M. in the evening the message is sent by the German naval authorities to the vessel to go to that area to search. The nearest the German naval authorities know on the evening of the 17th as to where the battle had taken place is Haaks Lightship. They know it is somewhere about there; they know nothing more than that. It is not till he is getting into that neighbourhood on the morning, or shortly after noon of the 18th, that Dr. Pfeiffer, not having received any further instructions, very properly telegraphs to Norddeich to ask for further instructions as to where he is to go. He gets the answer back: "Go to the area of 3° 55′ E. and 52° 51′ N. and search round there and the neighbourhood." That spot is 18 miles from the spot mentioned in Sir William Graham Greene's affidavit as to where the disaster had taken place, and there he is, and that is the whole story. He has come there for that reason, and whilst there he is stopped. The officer from the *Meteor*, who came on board, first imagined that there might be things stowed away in the middle of the sand ballast. That, we know, is not the case. The sand ballast has all been searched by now. The vessel has been in the hands of the naval authorities for six months, and no suggestion of that sort is made.

Cur. adv. vult.

May 21. SIR SAMUEL EVANS, PRESIDENT. This steamship was captured by some of His Majesty's ships of war on October 18 last.

A claim for her release is made on behalf of the Government of the German Empire on the ground that she was a military hospital-ship belonging to that Government.

I note, without further comment, that the claim is founded upon the provisions of Convention 10 of the Hague Conventions of 1907.

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The Crown formulated their case for the captors and against the claimants, in accordance with the terms of the same Convention.

I will deal with the case upon the same basis, avoiding all inquiry as to whether the Government of the German Empire is, or is not, precluded by its conduct of the present war from invoking the aid or protection of the 10th or any other of the Hague Conventions.

The provisions of the Hague Convention relate to three classes of hospital-ships—(1.) military hospital-ships of a belligerent Power; (2.) hospital-ships equipped wholly or in part at the expense of private individuals, or officially recognized relief societies, of a belligerent Power; (3.) hospital-ships so equipped at the expense of such individuals or societies of neutral countries.

We are here concerned only with the provisions relating to the first of these classes, namely, military hospital-ships of a belligerent.

Before stating the facts, it is convenient to summarize these material provisions.

A military hospital-ship must be constructed or adapted specially and solely for the purpose of affording relief to the wounded, sick, and shipwrecked. It is to afford relief and help to the wounded, sick, and shipwrecked of the belligerents without distinction of nationality. It must not be used for any military purpose. It is subject to the right of control and of search by the belligerents. Belligerents may refuse to help it, or may order it off, or may make it take a certain course, and put a commissioner on board; they may even detain it, if the gravity of the circumstances so require. It must be distinguished by being painted and marked in the prescribed ways, and make itself known by hoisting the prescribed flags.

If the name of a military hospital-ship shall have been communicated to the belligerent Powers at the commencement or during the course of hostilities, and in every case before it is employed, it shall be respected, and may not be captured while hostilities last.

If a hospital-ship complies with the above provisions it is

entitled to protection; but if it be used for any military purpose, either for aiding its belligerent owner militarily, or for injuring the enemy, that protection is lost. The fact that the staff is armed for maintaining order, and for defending the wounded or sick, and the fact of an apparatus for wireless telegraphy being on board, are not sufficient reasons for withdrawing the protection.

One other provision of the Convention may be mentioned. Art. 16 says that "after every engagement the two belligerents shall, as far as military interests permit, take steps to seek for the shipwrecked, the wounded, and the sick, and to protect them, as well as the dead, against pillage and improper treatment."

The test as to whether a ship claiming to be a hospital-ship is entitled to protection is supplied by these provisions and conditions, and the result depends upon whether there has been a compliance with and an adherence to them.

The facts may conveniently be considered under certain heads.

In the first place, the circumstances must be investigated in order to ascertain whether the ship was in fact used for the humane and justifiable purposes prescribed by the Convention, or whether she was actually employed wholly or in part for military purposes, either in favour of the belligerent Power to which she belonged or against any other belligerent.

In the second place, the construction and equipment of the ship will be examined and put to the test, in order to find out whether they are consistent with the sole purpose of administering to the relief and succour of sufferers (namely, "the wounded, sick, and shipwrecked"); or with the object, whether wholly or partially contemplated, of aiding the belligerent owner, and injuring the enemy in the military sense.

And lastly, the question will be considered whether the facts, and the reasonable inferences from the facts, together with the conduct of the officers in charge, lead to the conclusion that the ship was commissioned and intended to be employed solely as a hospital-ship within the letter and spirit of the Convention; or as a ship ready to be used and to take part in services of a

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military nature, which according to the Convention would exclude her from the category of legitimate hospital-ships, and preclude her from the protection accorded to them.

I will now state the material facts as they were established by the evidence.

[The learned President exhaustively reviewed the facts already set out (1) and continued :] Having stated what was done by the *Ophelia* and how she was employed so far as the facts were disclosed, it might be convenient here to state briefly what was *not* done.

In a sentence, no wounded, sick, or shipwrecked person was ever on board the ship ; not a hospital cot, bandage, or surgical instrument had been used, either on the ship or in connection with it ; and no service had ever been rendered or offered to any wounded, sick, or shipwrecked person by the *Ophelia*, or any of her staff.

This is not conclusive against her, of course, if otherwise it appeared that she was equipped and kept in readiness to render such service where it could be rendered.

After the ship was captured and brought into port, she was, of course, examined as to her construction and equipment as a hospital-ship.

With these matters I will deal shortly.

I will premise that there is no standard of suitability either of construction or equipment for a hospital-ship ; and it was said that the *Ophelia* was only intended as an auxiliary ship.

In addition to the evidence given viva voce on behalf of the claimants, and that supplied for the Crown in the affidavit of Commander Newman, R.N., I made observations myself on an inspection of the *Ophelia*.

The description of the vessel, and of her accommodation, sanitary arrangements, and equipment, is accurately given by Commander Newman in his affidavit, and it would be useless to repeat it here. His conclusion was that according to the requirements and standard of the British Admiralty the *Ophelia* was quite unsuitable for the purpose of a hospital-ship. He so reported in the circumstances which he sets out.

(1) Ante, pp. 129 to 137.

There being no standard available as a test of suitability in all cases, while accepting entirely the statements of Commander Newman, I am not prepared to say (although the deficiencies which were pointed out undoubtedly existed) that the ship was not in fact adapted, albeit inadequately and imperfectly, for the proper purposes of a hospital-ship. Whether she was constructed and adapted solely for such purposes is a wholly different matter.

Upon this question, the apparatus and appliances suitable for signalling purposes which at the time of capture still remained upon the ship have a bearing of significant importance. She carried a surprisingly large number of Very's lights of different colours—namely, 600 green, 480 red, and 140 white lights; Very's pistols, flares, small signal rockets, blue lights; Holmes' distress flares; besides ten large signal rockets of unusual strength for signalling purposes. As compared with these Commander Newman deposed that the number of Very's lights which according to Admiralty regulations are to be carried by a battleship or battle cruiser in H.M. Navy is only 100 green, 100 red, and 300 white; while the number to be carried by an auxiliary ship, or corresponding ship, would be only twelve of each. The conclusion to which Commander Newman, with his experience, came before he had any knowledge that the *Ophelia* was suspected as a signalling ship was, that "She was undoubtedly fitted and intended for signalling purposes."

The evidence given to the Court as to what quantity of these lights and signalling apparatus had in fact been used was very unsatisfactory. The evidence of the times and purposes for which they were used was, if anything, still more unsatisfactory. As to the latter, it was said by Dr. Pfeiffer that they were used in part to acknowledge Morse signals, and he suggested that they might even be used for lighting up parts of the sea in search for bodies. No evidence whatever was given of any such user; nor was any reliable evidence given of their being adapted for any such use, and it is not easy to see how the red and green lights would be serviceable for lighting up the waters. There were signalmen on board, who were vouched by Dr. Pfeiffer, but not one of them was called to state how the lights had in fact been used.

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As to the quantity which had disappeared Dr. Pfeiffer was not able to testify; but for this purpose he vouched the paymaster, Herr Urbanck, who had charge of the stores. When this witness was called he said that it was the duty of Dr. Pfeiffer to check the number of lights that were placed on board, and to check the number that had been used. The paymaster, however, kept store books and inventories which he said would have given the exact figures showing how many lights had been consumed, and how the number used was distributed between red, white, and green. To the astonishment of the Court, the cross-examination of this witness elicited that these records were burnt by him when the ship lay in the Thames a fortnight or more after the original capture. They were not thrown overboard with those documents which Dr. Pfeiffer consigned to the deep just before the search. They were burnt by the instructions of the staff-surgeon, Dr. Pfeiffer. Of the burning of these records Dr. Pfeiffer did not vouchsafe a word in his evidence.

This leads me to point out how seriously the Prize Courts have regarded the destruction of documents—usually described in the terminology of the Courts as "spoliation of documents." The cases have usually dealt with the spoliation of documents like ship's papers and documents relating to cargoes. Hospital-ships were little known in former days. But in my opinion the principles apply equally forcibly, to say the least, to documents which would throw light upon the way in which a ship purporting to be solely a hospital-ship had been employed.

There is a useful summary of the result of the cases in the judgment of Dr. Lushington in *The Johanna Emilie.* (1) I take out the following passages:—

"I must say a word as to the spoliation of papers generally. . . . . I do not know that there is to be found in any of Lord Stowell's judgments any direct definition of the word 'spoliation.' I am of opinion that the mere destruction of papers is not, under all circumstances, to be considered a spoliation; I say under all circumstances, because it (the principle) might be carried to a very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no

(1) (1854) 1 Spinks, 317, at pp. 325, 327.

relevancy to it, relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect of the rules laid down by Lord Stowell, because they are consistent with good sense, and with justice to all parties; but they must not be pressed beyond his true intention with reference to all the facts of the case. . . . .

"Now let me say a word on this, as to the time at which the papers are destroyed. I pray that my meaning may not be understood beyond the words I use. I hold time to be of great importance. If papers are destroyed when the capturing vessel is in sight, or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, and if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently before there is any probability that they were destroyed for fraudulent purposes and there is no evidence that it was for fraudulent purposes, then, though there is no spoliation, and though, no doubt, the inference of law is against the act during war, yet the case is of a less stringent nature."

Upon this important subject I will also cite what Chancellor Kent says in his well-known Commentaries (1):—

"The concealment of papers material for the preservation of the neutral character justifies a capture, and carrying into port for adjudication, though it does not absolutely require a condemnation. It is good ground to refuse costs and damages on restitution, or to refuse further proof to relieve the obscurity of the case, where the cause laboured under heavy doubts, and there was prima facie ground for condemnation independent of the concealment. The spoliation of papers is a still more aggravated and inflamed circumstance of suspicion. That fact may exclude further proof, and be sufficient to infer guilt; but it does not, in England, as it does by the maritime law of other countries, create an absolute presumption juris et de jure; and

(1) 12th ed., vol. 1, p. 158.

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yet a case that escapes with such a brand upon it is saved so as by fire. The Supreme Court of the United States has followed the less rigorous English rule, and held that the spoliation of papers was not, of itself, sufficient ground for condemnation, and that it was a circumstance open for explanation, for it may have arisen from accident, necessity, or superior force. If the explanation be not prompt and frank, or be weak and futile; if the cause labours under heavy suspicions, or there be a vehement presumption of bad faith, or gross prevarication, it is good cause for the denial of further proof; and the condemnation ensues from defects in the evidence, which the party is not permitted to supply."

These are sound and salutary doctrines. In my judgment they are in a special sense applicable to ships claiming to be hospital-ships.

In proportion to the immunity and protection which every belligerent Power actuated by feelings of humanity would desire to extend to ships engaged in aiding and rescuing those who suffer in maritime war, the conduct of those ships should be beyond suspicion. About the innocence of hospital-ships from engaging in warlike services there ought to be no question. Their records should be clean. If they are, their preservation would be an additional safeguard against capture. If they are not preserved, but destroyed, the inference that, if produced, they would be silent but eloquent witnesses of guilty practices would be strong.

As to some of the documents on board, such as the secret codes for wireless telegraphy, the law officers of the Crown did not complain of their destruction. In my view even documents like these ought not to be destroyed. They might be required in order to test the accuracy of the versions given of messages sent and received. They could quite appropriately be sealed up, if that were deemed advisable; and so sealed they would not be opened except under the strict superintendence of the Court, and the belligerents might rest assured that no disclosure would be made or allowed which would in any way affect the belligerent.

But whatever might be said in justification or palliation of the destruction of documents of this nature by reason of the orders

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of those in high command or otherwise, some of the other documents which were destroyed should certainly have been preserved and given up. Books recording messages transmitted or received by wireless telegraphy or by any form of signals directing the operations of the ship ought to be kept. If such messages related to the legitimate work of hospital-ships, they would not harm those in charge or prejudicially affect the ship itself. If they are destroyed on the eve of capture, no one could reasonably complain if unfavourable inferences were drawn.

For the burning in November (some fortnight or more after the ship was captured) of the records of the various signalling lights which had been supplied, and which had been used upon the ship since she set out as a hospital-ship, I see no justification whatsoever. In their absence such evidence as was given about them, and the use to which they were applied, meagre as it was, is rendered worthless.

By the express terms of the Convention the right of search of hospital-ships is given to belligerents. If those in charge of such ships can with impunity destroy all the documents and records of the ship immediately before a searching officer boards her, the right of search becomes to a great extent nugatory.

After a careful and anxious consideration of all the circumstances of the case, I find that the *Ophelia* never, in fact, rendered any help, succour, or service whatsoever to any single wounded, sick, or shipwrecked man; that she made no real effort at any time to render any such service; that her construction and equipment, although to some extent made adaptable, were not *well* adapted for the purposes of a hospital-ship; that she was well equipped for the purpose of acting as a signalling vessel; that considerable signalling appliances had been used, and that no satisfactory account was given of why, how, or when they were used; and that her officers complied, and were at all times ready to comply, with any orders from the German ships of war, or ships on auxiliary services.

And the conclusions to which the evidence has compelled me to come are that the *Ophelia* was not constructed, adapted, or used for the special and sole purpose of affording aid and relief

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to the wounded, sick, and shipwrecked; and that she *was* adapted and used as a signalling ship for military purposes.

She has, therefore, forfeited the protection claimed under the Convention.

The decree of the Court is that the *Ophelia* being an enemy ship is condemned as lawful prize.

Leave to enter an appeal within two months. Security 350*l*.

Solicitor for the Crown: *The Treasury Solicitor.*
Solicitors for claimant: *Hewitt, Urquhart & Woollacott.*

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May 11; *June* 7.

[IN THE COURT OF APPEAL.]

NAPIER *v.* NAPIER (OTHERWISE GOODBAN).

Divorce — Nullity of Marriage — Refusal to allow Marital Intercourse — "Wilful and persistent" — Matrimonial Causes Act, 1857 (20 & 21 *Vict. c.* 85), *s.* 22.

The decision in *Dickinson* v. *Dickinson* (*otherwise Phillips*) [1913] P. 198, that wilful and persistent refusal to allow marital intercourse is of itself a sufficient ground for a decree of nullity of marriage, is not justified in principle or by the authorities and must be overruled.

Decision of Sir Samuel Evans P. [1915] P. 65 affirmed on the facts.

APPEAL from a decision of Sir Samuel Evans P. (1)

This was an undefended suit by the husband for nullity of marriage. The petitioner alleged that the marriage was never consummated, that the respondent was incapable of consummating the marriage, and that she wilfully and persistently refused to allow the petitioner to have marital intercourse with her. The marriage took place secretly on March 19, 1907, at a time when the petitioner was about seventeen years of age. The parties never lived together, and the respondent in answer to letters from the petitioner refused through her solicitors to correspond

(1) Ante, p. 65.

with or to see the petitioner. The evidence is fully set out in the report of the case in the Court below.

Sir Samuel Evans P. held that the petitioner had not made reasonable or any real attempts to consummate the marriage. So far from wilful and persistent refusal by the wife, the state of things had been brought about by the conduct of the husband. It was therefore impossible to draw an inference of incapacity on her part; and the case did not come within *Dickinson* v. *Dickinson* (*otherwise Phillips*). (1) The petition must be dismissed.

The petitioner appealed.

On the appeal further evidence in the nature of correspondence was admitted with a view to showing that the refusal of the wife had been wilful and persistent.

Barnard, K.C., and *Le Bas*, for the appellant. The additional evidence which has been admitted in this Court shows that the petitioner did everything in his power to induce the respondent to live with him and that her refusal was wilful and persistent within *Dickinson* v. *Dickinson* (*otherwise Phillips*). (2) A decree of nullity can be granted although they have never lived together. The Court should infer that there is some impediment to consummation and make the decree. That was done in *W.* v. *W.* (*otherwise L.*) (3), in which the facts were on all fours with those in this case. The inference has been drawn in several cases where the parties have never lived together, for instance in *C.* v. *C.* (*otherwise H.*) (4); *F.* v. *P.* (*falsely called F.*) (5); *F.* v. *P.* (*otherwise F.*) (6); *S.* v. *A.* (*otherwise S.*) (7), where the principle was stated though the Court refused to draw the inference. If on the evidence the Court refuses to draw the inference of incapacity, this case is covered by *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1), which is good law and lays down that the Court can decree nullity on the ground of persistent refusal without drawing any such inference. A decree for restitution of conjugal rights would do the petitioner no good.

(1) [1913] P. 198, 201.
(2) [1913] P. 198.
(3) [1912] P. 78.
(4) (1911) 27 Times L. R. 421.
(5) (1896) 75 L. T. 192.
(6) (1911) 27 Times L. R. 429.
(7) (1878) 3 P. D. 72.

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C. J. Willock, for the respondent, took no part in the argument.

Cur. adv. vult.

June 7. LORD COZENS-HARDY M.R. This is an appeal from a judgment of the President declining, in an undefended action, to grant to the husband a decree of nullity of marriage. It is important to remember that it is not a proceeding to dissolve the marriage. It falls under s. 22 of the Matrimonial Causes Act of 1857, under which the Court is bound to proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts had theretofore acted and given relief. The Ecclesiastical Courts did not dissolve a marriage. They only declared that there had been no marriage at all. The present petition is based upon the allegation that the marriage, which took place in 1907, was never consummated and that the wilful and persistent refusal of the wife was the reason for non-consummation. The learned President held upon the evidence before him that there had not been a wilful steadfast and persistent refusal on the part of the wife and that the case did not fall within his own decision in *Dickinson* v. *Dickinson* (*otherwise Phillips*). (1) On the appeal further evidence, consisting of letters, was admitted, and I assume that the facts are now brought within the principles laid down in *Dickinson* v. *Dickinson* (*otherwise Phillips*). (1) It becomes therefore necessary to consider whether *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) ought to be followed. In my opinion refusal of marital intercourse cannot be relied upon as a ground for a decree of nullity, except so far as it may under certain circumstances be regarded as evidence of some abnormal physical condition. Nothing of that kind is alleged here. It is not for us to say whether the wife's conduct has been such as the Legislature might properly consider to be a ground for a dissolution of marriage. We are only exercising a statutory jurisdiction, and we must in the present case confine ourselves to the limits imposed by s. 22. I have had the advantage of considering the judgment which

(1) [1913] P. 198.

Pickford L.J. is about to deliver, and after his careful investigation of the principles and rules on which the Ecclesiastical Courts acted I think it would be a waste of time to attempt to cover the same ground.

With great respect to the President I think that *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) ought not to be followed, and for that reason I think his decision in the present case should be affirmed and the appeal dismissed.

PICKFORD L.J. This is an appeal from a decision of the President of the Probate, Divorce, and Admiralty Division dismissing a petition by the husband for a decree of nullity of marriage.

It is not necessary to set out the facts, as they are clearly detailed in the judgment of the learned President. (2) On these facts the President found that the marriage had not been consummated, that non-consummation was not due to any incapacity or malformation on the part of the wife, and that it was not due to her wilful and wrongful refusal, and dismissed the petition.

The petitioner in his appeal contends that the last two findings of the learned President are wrong, and, first, that he should have inferred an incapacity or malformation. I think on this point the judgment is right and that the facts did not support such an inference.

Secondly, the petitioner contended that the non-consummation was due to the wilful and wrongful refusal of the respondent, and that such wilful and wrongful refusal was a good ground for a decree of nullity, though there might be no facts on which an inference could be drawn of incapacity. The latter contention is based on the case of *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1), where such a refusal was held to justify a decree. The learned President in his judgment in this case says correctly that the decision in *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) went beyond any previous decision of the Court and that up to that time it had been held necessary to infer incapacity in order to support a decree of nullity. The question is one of general importance, and it seems right to consider whether, even assuming

(1) [1913] P. 198. (2) Ante, p. 65.

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the President's last finding to be incorrect, and the wilful and wrongful refusal established, a decree could be made.

If the pronouncing of a decree of nullity were a matter of discretion, or if it be competent to the Court to introduce a new ground hitherto unknown for such a decree, there are no doubt very strong arguments to be adduced in favour of upholding the decision in *Dickinson* v. *Dickinson (otherwise Phillips)* (1), though there would also be weighty arguments against it. It is, however, clear that such a decree is not a matter of discretion and that the grounds on which it can be made are limited by the Matrimonial Causes Act of 1857. By s. 10 of that Act a decree of nullity and a decree of dissolution of marriage are distinguished as different things; by s. 27 the grounds for a dissolution are stated, and by s. 22 it is provided that in all suits except those of dissolution of marriage (including therefore suits for nullity) relief shall be given on the principles prevailing in the Ecclesiastical Courts. The words of the section are: "In all suits and proceedings other than proceedings to dissolve any marriage the said Court shall proceed and act and give relief on principles and rules which in the opinion of the said Court shall be as nearly as may be conformable to the principles and rules on which the Ecclesiastical Courts have heretofore acted and given relief, but subject to the provisions herein contained and to the rules and orders under this Act."

The grounds of nullity are therefore limited by the Act just as strictly as the grounds of dissolution; but instead of being set out in the Act they have to be sought in the principles adopted in the Ecclesiastical Courts. It is therefore necessary to examine whether those Courts would have granted relief on the ground of wilful and wrongful refusal on the part of the wife to allow the marriage to be consummated where no incapacity existed. The practice and principles of the Ecclesiastical Courts which are relevant are the practice and principles in force at the time of the passing of the Act of 1857.

It is stated, no doubt correctly, in the report of the Divorce Commission of 1853, First Report, s. 17, and the report Divorce 3 Salkeld, p. 138, that for some time before the decision in

(1) [1913] P. 198.

Foljambe's Case (1) the Courts took a wider view of their powers of divorce a vinculo. That view did not affect the question of nullity on the ground of impotence and in any case ceased to exist at the date named and is of no importance in this case. We were referred to no case and I know of none in which relief has been granted on such a ground.

It is in my opinion contrary to the principles of the ecclesiastical law as administered in the Ecclesiastical Courts. Those Courts did not grant a divorce a vinculo matrimonii for any cause arising after the marriage, but only a separation a mensa et thoro, and in the cases where a decree of nullity or divorce a vinculo was granted it was in consequence of an impediment existing at the time of the marriage which made it no marriage, and the Court in pronouncing the decree did not consider that it was dissolving a marriage, but only proclaiming and declaring a nullity which already existed. See Ayliffe's Parergon Juris Canonici, p. 229, where the author says: "I shall proceed to speak of a divorce a vinculo matrimonii. In all those cases where such a divorce was, the marriage was not de jure, according to the canonists, because it was void ab initio: For where the incapacity arises from any matter precedent to the marriage, there the marriage is only de facto; and a sentence of divorce in such case is only declaratory, that the marriage is dissolved, for it was absolutely void before, and either of the parties might marry again, though the other was living. But 'tis otherwise where the divorce is occasioned ex causa subsequenti as in cases of adultery, cruelty, and the like. For there the marriage being once good it can never be dissolved a vinculo; though 'tis sufficient to separate the parties a mensa et thoro." So in Burn's Ecclesiastical Law by Phillimore, 9th ed., vol. 2, p. 500, "There be two kinds of divorces: the one that dissolveth the marriage a vinculo matrimonii, as for consanguinity; and the other a mensa et thoro, as for adultery; because that divorce by reason of adultery cannot dissolve the marriage a vinculo matrimonii for that the offence is after the just and lawful marriage." See also Shelford on Divorce, p. 208; Oughton's Ordo Judiciorum, vol. 1, tit. 193, s. 17; and *Bury's Case* (2), amongst other authorities. This may

(1) (1602) Moore, p. 683. (2) (1598) Dyer, 179a; 5 Rep. 98b.

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seems hardly consistent logically with the doctrine also held by these Courts that marriages under these circumstances were only voidable. See Shelford on Marriage and Divorce, p. 484: "The canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities," (referring to suits for nullity on the ground of impotence) "only make the marriage voidable, and not ipso facto void until sentence of nullity be obtained"; but this inconsistency, if any, does not alter the law that to obtain such sentence there must have been a disability existing at the time of the marriage. In *B.* v. *N.* (1) it is said such marriages are void ab initio. In *Lewis* v. *Hayward* (2) the House of Lords, reversing the Court below, made a decree of nullity declaring the marriage void ab initio, and the Lord Chancellor in dealing with the question of delay stated it to be a personal exception to the petitioner and not otherwise a bar to a suit for nullity, the maxim Quod ab initio non valet, in tractu temporis non convalescet. applying to it.

It cannot, I think, be doubted that the Ecclesiastical Courts never accepted non-consummation as a ground for nullity unless it could be referred to impotence or incapacity existing at the time of the marriage. The amount and nature of the evidence necessary to prove such incapacity have varied from time to time, but the necessity of establishing it has never varied. Wilful and wrongful refusal not arising from an antecedent incapacity is a matter arising after the marriage. It would not have been a ground of nullity in the Ecclesiastical Courts and therefore cannot be so now.

In addition to the conclusion to be drawn from an examination of the practice of the Ecclesiastical Courts there is the fact that since the Divorce Act, 1857, no instance of relief being granted on such a ground can be found until the case of *Dickinson* v. *Dickinson* (*otherwise Phillips*) (3), and there is an unbroken series of authority that it cannot be granted. See Sir James Hannen P. in *S.* v. *A.* (4), Sir Francis Jeune P. in *F.* v. *P.* (5), Sir Gorell Barnes P. in *W.* v. *S.* (6), and Sir S. Evans P., the

(1) (1854) 1 Spinks, 248, 262.
(2) (1866) 35 L. J. (P. & M.) 105.
(3) [1913] P. 198.
(4) 3 P. D. 72.
(5) 75 L. T. 192.
(6) [1905] P. 231.

present President, in *W.* v. *W.* (1) These learned judges on more than one occasion expressed their opinion that the state of the law was not satisfactory : see per Hannen P. and Gorell Barnes P. in the cases cited; and it cannot be satisfactory that judges of such eminence should feel themselves compelled, in order to grant the relief which they thought justice required, to draw an inference of incapacity when they clearly considered it doubtful whether the facts warranted it. Such an inference was not a legal fiction, but an inference of fact to be drawn from the evidence in each particular case.

Still I do not think it was in the power of the Court to alter the law; such alteration must be made if at all by the Legislature which has established the law. I think the decision of *Dickinson* v. *Dickinson* (*otherwise Phillips*) (2) did so alter the law and therefore cannot be upheld. The real result of that case is that, while purporting to alter the practice as to decrees of nullity, it adds an additional ground of dissolution of marriage to those provided in the Matrimonial Causes Act, 1857, and this cannot be done by a decision of the Court. Even assuming, therefore, that the non-consummation were held in this case to arise from persistent and wilful refusal, I do not think the Court could make a decree of nullity, and the appeal must be dismissed.

I have not thought it necessary to consider whether the facts in this case are sufficient to prove such a refusal, but I do not wish to suggest any opinion that the judgment of the learned President may not be upheld on the ground also that they do not.

WARRINGTON L.J. This is a petition by a husband asking for a decree of nullity of marriage. The grounds alleged in the petition are (1.) the incapacity of the wife and (2.) her wilful and persistent refusal to permit the petitioner to have marital intercourse with her or to consummate the marriage. The parties have never cohabited, nor has the marriage in fact been consummated.

As to the first ground, it is not contended that any structural defect has been proved. Further, the facts are such that, in my opinion, there is no ground for the inference made in certain

(1) [1912] P. 78. (2) [1913] P. 198.

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cases that there is any incapacity in a wider sense, such as would include some abnormal condition, mental or physical, resulting in the refusal to cohabit. There remains then as the only ground the wilful and persistent refusal on the part of the wife. The learned President has found that there was no wilful and persistent refusal on her part and has refused to make a decree. The petitioner appeals on the issue of fact. I agree with the learned President, and that, notwithstanding the further evidence adduced in this Court, which in my opinion does not improve the petitioner's case. But I do not think that we ought to dispose of the case without an expression of opinion on the question of law whether a marriage can be declared null and void where there is only a wilful and persistent refusal of intercourse on the part of one of the spouses—incapacity not being proved and the circumstances not justifying the inference thereof. In *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) the President has held that where consummation has been prevented by the wilful and persistent refusal of one of the spouses this circumstance is s ufficient of itself to enable the Court on a petition presented bona fide by the other spouse to declare the marriage void. In my opinion this decision is not justified in principle or by the authorities. In all suits and proceedings other than proceedings for dissolution of any marriage, the Court is to proceed and act and give relief on principles and rules which, in the opinion of the Court, shall be, as nearly as may be, conformable to the principles and rules on which the Ecclesiastical Courts formerly acted and gave relief (Matrimonial Causes Act, 1857, s. 22). It is clear that a nullity suit is not a proceeding for dissolution of a marriage within the meaning of the Act. In *S.* v. *A.* (2) Sir James Hannen said: "The ground upon which the Court proceeds in these cases is the physical incapacity of the parties. A wilful wrongful refusal of marital intercourse is not of itself sufficient to justify the Court in declaring a marriage to be null by reason of impotence." It seems to me that this must be regarded as a correct statement of the law when it is borne in mind that nullity, in its very nature, presupposes a cause existing at the date of the marriage. Wilful and persistent

(1) [1913] P. 198. (2) 3 P. D. 72.

refusal, unless it results from incapacity, necessarily arises after the marriage. It is true that in recent times the Court has not always required proof of an actual structural defect as evidence of incapacity, but has considered itself at liberty to infer from the conduct of the parties or one of them an incapacity arising from some abnormal condition of mind or body. This, however, is nothing more than allowing a recognized ground for a decree to be proved in a particular way. The learned President has gone further and has introduced a new ground altogether. The jurisdiction is not in my opinion a discretional jurisdiction, but is to be exercised according to certain rules and principles, and I cannot find that such rules and principles permit such a ground for a decree of nullity as the learned President held to be sufficient. I am of opinion, therefore, that the ground on which *Dickinson* v. *Dickinson* (*otherwise Phillips*) (1) was decided was not sufficient to support the decree. I must not be taken to express any opinion on the question whether the facts of that case would justify the inference of incapacity in the wider sense to which I have referred. The decree may have been justified, but not on the ground accepted by the learned President.

Appeal dismissed.

Solicitors : *Markby, Stewart & Co. ; Woodcock Ryland & Parker, for Tweedale, Sons & Lees, Oldham.*

(1) [1913] P. 198.

H. C. R.

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June 28, 29.

KENNARD *v.* KENNARD (The King's Proctor showing Cause).

MORRIS *v.* MORRIS (The King's Proctor showing Cause).

Divorce—Practice—Costs—Matrimonial Causes Act, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2—*Wife's Petition—King's Proctor's Plea—No Answer—No Evidence of Separate Estate—Petitioner condemned in Costs.*

The discretion as to costs, given to the Court by s. 2 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), is an absolute discretion, to be exercised according to the facts and circumstances of each particular case; and where the petition is by the wife, she may be condemned in the costs of the King's Proctor, who has intervened under that section and successfully shown cause against the decree nisi being made absolute, notwithstanding the fact that there is no evidence that the petitioner has or ever had separate estate.

These were both cases brought before the Court on motions by the King's Proctor, upon his unopposed pleas, showing cause why the decrees nisi should not be made absolute.

In each case the wife was petitioner and had obtained a decree nisi contrary to the justice of the case.

There was no evidence before the Court that the petitioner in either case was, or ever had been, possessed of any separate estate.

In one case, objection was taken by counsel for the petitioner that, in the absence of evidence of means, the Court could not, or should not, condemn a wife in the costs.

In the other case the motion was unopposed.

The King's Proctor asked (according to the usual common form adopted and followed during a long period, extending, it was said, over many years) that the rescission of the decree nisi and the dismissal of the petition should be accompanied by the further provision, in the order of the Court, that the petitioner, in each case, be condemned in the costs of the King's Proctor.

Barnard, K.C., and *H. C. A. Bingley*, for the King's Proctor (in *Kennard* v. *Kennard*), produced a list of cases, extending

over many years, in which orders for costs had been made as a matter of course without evidence of separate estate.

BARGRAVE DEANE J. There is no doubt these orders have been made. I am going to make a similar order in each of the present cases, although I protest against the practice.

There is a well-known and old-established rule of this Court, that no married woman is to be condemned in costs unless it is shown that she has separate estate.

The Court appears, up to now, to have treated that rule as inappropriate to King's Proctor cases.

I am, as I have said, going to follow the practice of the Court in these cases, but I do not consider I am bound by it.

Acton Pile, for the petitioner, Mrs. Kennard. By the Matrimonial Causes Act, 1860 (23 & 24 Vict. c. 144), s. 7, the wife's liability to be condemned in costs is expressly limited by the words "including a wife if she has separate estate." That section merely indicates the parties whom the Court has power to condemn in costs; it does not confer jurisdiction to condemn a wife in costs: *Lautour* v. *Queen's Proctor* (1); but s. 2 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), does not say anything at all as to who is to pay costs; it merely provides that certain parties may recover costs. The Act of 1860 is not repealed, and Cozens-Hardy M.R. pointed out in *Higgins* v. *Higgins* (*the King's Proctor showing Cause*) (2) that it was an amending Act, the reason for the amendment being that the Queen's Proctor was not able to get his costs in cases other than cases of collusion.

It is not the fault of this petitioner that the point does not appear to have been raised during the past thirty or forty years.

It is raised here in consequence of a notice given by letter from the King's Proctor, saying that the point was going to be argued on behalf of the King's Proctor.

If the Court has no jurisdiction to do a certain thing, it is no argument, when the point is eventually raised, to say that

(1) [1864] 10 H. L. C. 685.
(2) [1910] P. 151 (sub nom. *Higgins* v. *King's Proctor*).

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the Court has done that very thing without question for a number of years.

The rule always followed by the ecclesiastical tribunals is specifically mentioned in a case which dealt, not with costs of the Queen's Proctor, but with husband's costs: *Miller* v. *Miller* (1); while in *Milne* v. *Milne and Fowler* (2) Lord Penzance, in ordering a wife with large separate income to pay the costs of her husband, refers to the general "assumption that she has not got any property."

If the wife have separate estate, she may be condemned in costs if the Court thinks it just she should pay: *Hyde* v. *Hyde, Fellgate and Others* (3); but where the wife has only a pittance, the Court will not condemn her, however unreasonably she may have acted in the proceedings: *Aires* v. *Aires*. (4)

The rule as to wife's costs was interpreted upon consideration of whether she had sufficient separate estate or not: *Allen* v. *Allen*. (5)

[BARGRAVE DEANE J. Cases between husband and wife are distinguishable from the present class of cases.]

That is the argument on the statutes. Then as to the decided cases. The decisions most against the present petitioner are *Hampson* v. *Hampson* (*the King's Proctor showing Cause*) (6), in which, though the petitioner is stated to have sued in forma pauperis, it is assumed that an order for the costs of the King's Proctor was formally made against her, and *Pretty* v. *Pretty* (*the King's Proctor showing Cause*). (7) But in those cases the petitioner was going to marry a person of some position, and the Court expressed the view that the King's Proctor ought to be reimbursed, wholly or in part, if that were possible. Moreover, both those cases were marked by the unusual seriousness of the facts.

In *Crowden* v. *Crowden* (*the King's Proctor showing Cause*) (8),

(1) (1869) L. R. 2 P. & M. 13, at p. 15.
(2) (1871) L. R. 2 P. & M. 202, at p. 204.
(3) (1888) 59 L. T. 523.
(4) (1891) 65 L. T. 859.
(5) [1894] P. 134.
(6) [1914] P. 104.
(7) [1911] P. 83.
(8) (1906) 23 Times L. R. 143.

the petitioner, who had wilfully denied the charges made by the King's Proctor, without appearing to substantiate her denial, was described as the manageress of some licensed premises, and, although the point was not raised, she might be assumed to possess some means; while in *Brooke* v. *Brooke* (*the King's Proctor showing Cause*) (1), though the petitioner had to pay the costs of the King's Proctor, she obtained her decree absolute.

Davison v. *Davison* (*the King's Proctor showing Cause; Montgomerie intervening*) (2) was a case quite out of the ordinary, and it may be assumed that the petitioner had means.

Barnard, K.C., was not called upon to argue in reply.

[In the case of *Morris* v. *Morris*, *Barnard, K.C.* (*Willock* with him), appeared for the King's Proctor, but no one represented the petitioner on the hearing of the motion, and there was no separate argument.]

BARGRAVE DEANE J. There is no doubt that in suits between husband and wife the law is that the wife, if unsuccessful, will not have to pay the costs unless she is shown to have separate estate. But it is a different thing in cases of intervention.

Where the King's Proctor or any other person intervenes to show cause against a decree nisi being made absolute, then the matter is on a different footing and principle altogether. It is regulated by the Matrimonial Causes Act, 1878, which was expressly passed for the purpose, and s. 2 of that Act provides that in such cases the Court may make such order as to the costs of the King's Proctor or of any other person who shall have intervened, or of all or any parties to the intervention, as may seem just.

In such cases, it is not the husband and wife who are fighting. It is the husband or the wife, as the case may be, who is fighting the King's Proctor or some independent person who has intervened; and the Court has an absolute discretion in regard to the costs of any person who is a party to the litigation.

This question was raised not long ago before me, and in the Court of Appeal, in the case of *Carter* v. *Carter* (*the King's Proctor*

(1) [1912] P. 205, n. (2) [1909] P. 303.

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intervening). (1) There the wife alleged that the husband had deserted her and had been guilty of adultery. The King's Proctor intervened to show cause why the decree nisi obtained by the wife should not be made absolute, and he alleged that there had been no desertion. He succeeded upon his intervention and he obtained an order for his costs against the unsuccessful lady petitioner. She then presented a fresh petition, in which she alleged cruelty and adultery, and she obtained a decree. The King's Proctor again intervened, and he failed in that intervention and was condemned in costs.

There was an appeal, and the Court of Appeal held that the King's Proctor could be condemned in the costs.

How can it be said, then, that this Court has not an absolute discretion as to the costs in such cases?

It is not a question between husband and wife: it is the case of a petitioner—be it husband or wife—who has come to this Court and obtained a decree contrary to the justice of the case. Each case must be judged on its own particular facts and merits. Nothing whatever is said in the Act as to the wife having separate estate.

All the Lords Justices who heard the appeal in *Carter* v. *Carter* (*the King's Proctor intervening*) (1) agreed that the section gave this Court an absolute discretion to award costs for or against any party to the intervention, and they approved what was done in the case of *Westcott* v. *Westcott* (*the King's Proctor showing Cause*) (2), although no point had been raised as to whether the petitioner (wife) possessed separate estate.

Now take the present case, *Kennard* v. *Kennard* (*the King's Proctor showing Cause*), and see whether I am right in exercising my discretion by ordering the petitioner to pay the costs of the King's Proctor's intervention.

The decree nisi was pronounced on July 21, 1914.

The King's Proctor intervened to show cause why that decree should not be made absolute. He alleged that there had been no desertion, and that the case set up at the hearing of the

(1) [1910] P. 151; reported under the title *Higgins* v. *The King's Proctor*.

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(2) [1908] P. 250.

petition was false, and further that the petitioner had committed adultery. What sort of adultery? The petitioner does not dispute the allegations and has allowed the intervention to go by default. The plea alleges (inter alia) that from July to September, 1911, the petitioner lived with a man (named) at an address named and habitually committed adultery with him; that from September, 1911, to March, 1912, the same thing happened at another address; and that from April, 1912, to about July, 1914 (except for about two months in 1913), the petitioner habitually committed adultery with the same man at other addresses: and that she also committed adultery with other men.

It is clear, therefore, that the petitioner had the impudence to come and ask for a decree nisi at a time when she was habitually committing adultery. Is this Court to have no protection against persons who come here in this way and obtain decrees contrary to what they know to be the justice of the case? I have full discretion as to costs, and I am bound to say that if this is not a case in which I ought to exercise my discretion by awarding costs against the petitioner, I do not know of such a case. In the exercise of my discretion, I rescind the decree nisi, dismiss the petition, and condemn the petitioner in the costs of the King's Proctor.

In the case of *Morris* v. *Morris* (*the King's Proctor showing Cause*) it appeared, when the case came on upon the wife's petition, that an answer had been filed by the husband but was struck out; and, the King's Proctor having intervened to show cause why the decree nisi should not be made absolute, the case came on, upon motion by the King's Proctor, in default of any answer to the King's Proctor's plea.

This lady was accused of adultery at an early stage of her suit. For some reason not explained to the Court the husband withdrew that charge, although it was a perfectly good answer.

It looks like collusion, though that is not pleaded by the King's Proctor, but upon his intervention, alleging the same adultery previously set up by the husband in his answer, she does not attempt to deny the truth of the plea. This also is a case in

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which, in the exercise of my discretion, I am clearly of opinion that she ought to be condemned in the costs.

The decree nisi will be rescinded and the petition dismissed, and the petitioner will be condemned in the costs of the King's Proctor.

Solicitors for petitioner in *Kennard* v. *Kennard*: *Jacksons, Elwell & Curran.*

Solicitors for petitioner in *Morris* v. *Morris*: *Osborn & Osborn.*

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H. D. G.

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[1915 Fo. 79.]

Admiralty—Ship—Collision—Steam Vessel turning—Sound Signals—Port of London By-laws, 1914, *rr.* 23, 27.

Those in charge of the defendants' steam vessel, being about to bring up in Gravesend Reach, gave the four short blasts of the steam whistle required by r. 23 of the Port of London By-laws, 1914, to signify that they were about to turn the vessel round, and followed this with one short blast to indicate that they were turning the vessel with her head to starboard. These signals were repeated for the information of an approaching vessel (the plaintiffs' steamship) which was overtaking them; but on putting the engines astern, in the course of the turning movement, the pilot in charge of the defendants' vessel did not give three short blasts under r. 27. In an action of damage by collision:—

Held by Bargrave Deane J.,—whilst finding both vessels to blame in different proportions for bad look-out and other defects in their navigation—that the omission on the part of the pilot of the defendants' vessel to give the three-blast signal, when putting the engines full speed astern, was the primary cause of the collision, as, if that signal had been given, those in charge of the plaintiffs' vessel would have had notice, particularly valuable at night, that the other vessel was moving bodily astern to the extent, in this case, of a length and a half.

Reference was made to the case of *The Harberton* [1913] P. 149, where, in the circumstances, the three-blast signal was not deemed requisite.

ACTION OF DAMAGE BY COLLISION.

The plaintiffs were the owners of the steamship *Monica.*

The defendants, and counter-claimants, were the owners of the steamship *Ancona.*

The case is reported on the question of the appropriate sound

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signals to be given when a steam vessel is turning round in the river Thames (1), and, in the process of turning, her engines are ordered astern (2) and the ship is sent astern for a considerable distance.

On January 18, 1915, about 6 P.M.—the weather being clear, the wind westerly moderate, and the tide ebb of from two to three knots—the defendants' screw steamship *Ancona*, of 1168 tons gross register, with engines of 120 horse power nominal, 248 feet in length, and manned by a crew of twenty-three hands, was about off the Powder Bank in Gravesend Reach, river Thames, in the course of a voyage from London to Lisbon with general cargo and Government stores, and in charge of a duly licensed Trinity House pilot. She was about to anchor to take in explosives, and before beginning to manœuvre to get head to tide, she sounded four short blasts in rapid succession, followed by one short blast, on commencing to turn under a hard-a-port helm with her head to the southward. Whilst her engines were working full speed astern and her starboard anchor dropped, the masthead and green lights were observed, bearing about astern, at considerably less than half a mile, of a vessel which proved to be the *Monica*, a screw steamship of 841 tons gross register, belonging to the plaintiffs, 212 feet in length, and manned by a crew of sixteen hands. She was on a voyage from London to Hull in ballast, and was making about five knots through the water. The whistle of the *Ancona* was again sounded four short blasts followed by one short blast, to which the *Monica* replied with two short blasts to indicate that she was starboarding, whereupon the engines of the *Ancona* were put full speed ahead; but the *Ancona* still had

(1) The Port of London River By-laws, 1914, r. 23: "When a steam vessel under way is about to turn round she shall signify the same by four short blasts of the steam whistle in rapid succession followed after a short interval if turning with her head to starboard by one short blast, and if with her head to port by two short blasts, and whilst turning shall repeat such signal to any approaching vessel, which latter vessel shall take action to avoid collision."

(2) Rule 27: "When vessels are in sight of one another, a steam vessel under way in taking any course authorised or required by these by-laws shall indicate that course by the following signals on her steam whistle, viz.:—

. . . . .

"Three short blasts to mean 'My engines are going astern.'"

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sternway, and the two vessels came into collision, the starboard side of the *Monica* with the stern of the *Ancona*. So much damage was done to the *Monica* that she had to be beached, and for the damage sustained by the *Ancona* the defendants counterclaimed.

1915. June 24, 25. *Laing, K.C.*, and *Lewis Noad*, for the plaintiffs, the owners of the *Monica*. The collision was due to defective look-out on the part of those in charge of the *Ancona*, the attention of the pilot not having been drawn to the lights of the *Monica* until it was too late to stop the effect of the engines driving the ship astern before the *Monica* had passed. The pilot should also have complied with No. 27 (set out above) of the Port of London River By-laws by giving three short blasts of the whistle on going astern.

Bateson, K.C., and *D. Stephens*, for the defendants and counter-claimants, the owners of the *Ancona*. The *Monica* was in her wrong water, as it was her duty to keep to her starboard side of mid-channel under No. 33 of the Port of London By-laws, and if she had complied with that rule the collision could not have occurred. It was also the duty of the *Monica*, as the overtaking vessel, to keep out of the way of the *Ancona*, and, on hearing the four short blast signal, she should have taken, in the words of the rule, "action to avoid collision." This she failed sufficiently to do, thereby committing breaches of rr. 23 (set out above), 27 (set out above), 39 (reducing speed), and 42 (look-out) of the by-laws. The three short blasts to indicate that the engines are going astern are not required to be given as well as the appropriate four-blast signal when a vessel is turning: see *The Harberton* (1), decided under r. 40 of the Thames By-laws, 1898.

Laing, K.C., in reply. The decision in *The Harberton* (1) arose out of the special circumstances of the case, and does not constitute a precedent for this case.

BARGRAVE DEANE J. In this case the two vessels came into collision at the bottom of Gravesend Reach, three-quarters of a

(1) [1913] P. 149.

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mile short of the Ovens buoy, at about 6.17 on the night of January 18, 1915. They were both proceeding down river; one was going to sea, and the other was going to take in explosives on the Powder Bank. It was the leading ship, the *Ancona*, which was going to take in ammunition, and she was looking for a berth on the Powder Bank where she could lie and take it in. The other vessel, the *Monica*, was going down, and she was going down, as I find, at about half speed at the important time in question.

It was the duty of the *Monica* to keep out of the way of the other vessel. She was overtaking her—she admits she was going slightly faster and was overtaking her—and therefore she had the duty of keeping out of the way. She did not keep out of the way successfully because she came into collision with the *Ancona*. I look at the rules—although the master of the *Monica* does not seem to care much for them—and I find r. 39 says this: "Every steam vessel which is directed by these by-laws to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed or stop or reverse." The master of the *Monica* did nothing of that sort. All he did was to starboard his helm to pass under the stern of the *Ancona*. In the circumstances he failed to keep clear, and in the judgment of the Court he is partly to blame for this collision for that reason. It appears that he does not know all the rules. This is a very salutary rule, especially at night, when you cannot see clearly what is happening.

Let me take the other vessel, the *Ancona*. She was in charge of a pilot, a pilot with considerable experience, and she was looking for a berth, as I have said, on the Powder Bank. Her crew were on deck. Her master was on the bridge with the pilot, the second officer was at the wheel, and there were, of course, other people about the ship. I suppose there was somebody—I do not know, and we have had no information about it—aft on the poop. The pilot, having reached a place where he thought he could turn and take up a berth, blew four short blasts and one short blast, indicating that he was turning round, and turning round with the vessel's head to starboard.

At that time, apparently, the signal was not heard by the

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Monica. Whether she was further off or whether those on board were not listening I do not know, but they did not hear it. The pilot at that time did not see, and did not have his attention called to, any other vessel coming down astern, and it was not until the master of the *Ancona* called his attention to her at a later period that he realized that there was this vessel approaching. Meanwhile he had dropped his anchor, put his engines full speed astern, and hard-a-ported his helm, bringing the vessel round with the assistance of the ebb. He says that he sent his vessel a length and a half astern, and was reversing for two minutes, and that is corroborated by the ship's officers. But he did not blow three blasts. As I have said, this was at night. You cannot see as well by night whether a vessel is reversing and going astern as you can by daylight.

The rule is perfectly clear that if a vessel reverses her engines she shall blow three blasts to indicate the fact. It is true that in other cases—to one of which, *The Harberton* (1), counsel has called my attention, where a vessel was turning round, backing and filling—it was suggested—though I am not sure it was so found—that this rule does not apply.

I do not agree with that at all. Turning is one thing, going astern to the extent of a length and a half is another; and I do not think that blowing four blasts, the turning signal, at night, will cover the fact that you are going astern a length and a half from where you are. I for one will not sanction such an action as this. If a pilot or master chooses to put his engines full speed astern, and does it effectually, so as to send his ship bodily astern for some distance, then he must signify the fact to others by giving three blasts. In my opinion that omission on the part of the *Ancona* was primarily the cause of this collision. If he had given notice when he put his engines astern or when he saw this other vessel, which he admits he did, some time before he stopped his engines and put them ahead, the other vessel would have had better notice of what was happening.

I am of opinion that blame attaches to the *Ancona* for not giving notice in the proper way, by three blasts, when the engines were put astern. When a vessel is turning it does not

(1) [1913] P. 149.

follow that she is going to change her position to a material extent beyond her own length—that is to say, that she will move away from her original position for a distance of over 100 yards. This is quite a different thing from putting her engines astern to the extent of merely backing and filling. I have said that this was primarily the fault of the pilot. Can I say that it was also the fault of the ship? Here I am in a more difficult position. The conclusion I have come to is that it was the fault of the ship in addition to the fault of the pilot. I think the pilot ought to have had more assistance. The master did not give information until this vessel was quite close. It is true that when he did give information the pilot still allowed his vessel to go astern. He says: "The captain drew attention to a white and green coming down half a mile away. I told the captain to blow 'four and one,' and that was done. Shortly afterwards the *Monica* replied with two short, and she still came up altering very little. When a little nearer I ordered 'four and one,' which was replied to with two short again. The ship now was very close, one to two cables. Seeing the danger, I ordered the engines full speed ahead." The pilot continued to let his engines go astern after he had notice given him of the approach of the other vessel. In the opinion of the Court the pilot would have put the engines ahead sooner if he had had earlier notice. But there is another point in the case which hits the ship. In the opinion of the Court the vessel, the *Monica*, was a great deal closer to the *Ancona* than is now stated. She is put as being half a mile away. The Court does not believe that, but believes that she was much nearer at that time, and that a proper look-out was not kept on the vessel so as to give sufficient information to the pilot. It is quite true that it is alleged that "four and one" was blown three times. There is a contradiction about that, and I am not sure whether it was blown twice or three times, and there is some suggestion that it was blown twice; but taking the whole story as told by the witnesses for the *Ancona*, the Court has come to the conclusion that the story is not accurately told as to the distance when the other vessel was first seen, and that the pilot did not receive the proper assistance which ought to have been given to him at that point.

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Bargrave Deane J.

For these reasons the Court is of opinion that the *Ancona* is also to blame—both the pilot and the ship. I have to say in what proportions the damage should be made good.

I was at one time inclined to say one-quarter and three-quarters, but I think it is fairer to say one-third and two-thirds. There is not very much difference, but there is a difference, and it is fairer.

Therefore I say that the *Ancona* must pay two-thirds of the damage and the *Monica* one-third. I must not be misunderstood. It is the pilot who ought to have ordered the three blasts to be blown. I am blaming the pilot for not ordering the three-blast signal. I am not blaming the ship for that, but for not giving sufficient assistance to the pilot in the way of look-out.

Both vessels to blame, the Ancona in the proportion of two-thirds, the Monica one-third.

Solicitors for the plaintiffs, the owners of the *Monica*: *William A. Crump & Son.*

Solicitors for the defendants and counter-claimants, the owners of the *Ancona*: *Thomas Cooper & Co.*

T. L. M.

SCHOFIELD *v.* SCHOFIELD (The King's Proctor showing Cause). 1915 *Feb.* 11.

Divorce—Misconduct of Husband Petitioner—Isolated Act—Birth of Child—No Disclosure at Hearing—No Condonation—Matrimonial Causes Act, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Exercise of Discretion.*

A husband, who had been living apart from his wife for some years, committed an isolated act of adultery, resulting in the birth of a child, and in an undefended suit obtained a decree nisi for dissolution of the marriage without disclosing the fact of his own adultery.

By reason of the separation, there had been no condonation by the wife of the husband's adultery.

The Court (the King's Proctor showing cause) exercised its discretion in favour of the petitioner upon the grounds of public morality and in the interests of the woman with whom the misconduct had been committed and of her child.

On December 8, 1913, the petitioner, William Schofield, obtained a decree nisi for dissolution of his marriage with Lilian Ethel Schofield, on the ground of her adultery.

On June 16, 1914, the King's Proctor filed his plea, alleging that divers material facts respecting the conduct of the petitioner had not been brought to the knowledge of the Court; that prior to and up to the time when the petition was presented, the petitioner had been for some time past and was then habitually committing adultery with a young woman (named); and that on or about October 3, 1911, she, at an address named, gave birth to a child of which the petitioner was the father.

The King's Proctor therefore prayed the Court to rescind the decree nisi, to dismiss the petition, and to make such order as to costs and otherwise as should seem meet.

Particulars of the plea set forth, inter alia, that the petitioner was constantly in the said woman's company; that he frequently visited her at her abode, both before and since the birth of the said child, and that previously to the child's birth the petitioner was constantly seen abroad in the company of the said woman until late at night. Further, that since September, 1912, the said woman, along with the said child, had frequently visited the petitioner at the address where he carried on business and where

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he resided alone; and, further, that before the registration of the birth of the said child, i.e., in October or before November 13, 1911, the petitioner called upon the local registrar of births with reference to such registration, and towards the end of March, 1914, he again called in company with the mother of the child with reference to such registration.

The petitioner in his answer admitted the allegation as to the birth and paternity of the child, which he stated was the result of a single act of adultery committed about the beginning of the year 1911. He denied any other act of adultery, and further stated that, believing his wife to be dead and that he would be at liberty to marry again at the expiration of seven years, he became engaged to the young woman named in the King's Proctor's plea, but that, shortly before the expiration of seven years from the time when the respondent without just cause deserted him, he ascertained that the respondent was still alive. The petitioner therefore prayed the Court to reject the prayer of the King's Proctor and to exercise in his favour the discretion conferred upon the Court by s. 31 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85).

In reply, the King's Proctor joined issue and, as to the last plea, alleged that the petitioner had no reason to believe his wife to be dead at the time of the alleged engagement, and that the petitioner could at all times and without difficulty have ascertained the whereabouts of the respondent; furthermore, that the respondent did not desert the petitioner without just cause or at all.

In a further paragraph which, after discovery, was withdrawn the King's Proctor put forward charges of habitual cruelty, neglect, and ill-treatment.

The case was heard before the President, sitting without a jury, and evidence was called on both sides.

Barnard, K.C., and *Bingley*, for the King's Proctor.
H. Durley Grazebrook, for the petitioner.

SIR SAMUEL EVANS, PRESIDENT. It is established, and, indeed, admitted, that the petitioner committed adultery with this

young woman, the result of which was the birth of a child on October 3, 1911. Therefore, the King's Proctor's intervention has been justified.

The question remains whether or not I ought to exercise the discretion vested in me by the law and say that, notwithstanding this culpable conduct on the part of the petitioner, I will allow the decree nisi to stand, so that it may ripen into a decree absolute, and give him his freedom.

These cases must all be looked upon in the light of their own facts, subject, of course, to principles which ought not to be disregarded.

In the cases which have recently been before the Court—certainly in the cases which have been before me—no relief has been given, in the discretion of the Court, except where there has been condonation. In such cases, where there has been complete condonation, and where there were no other facts of an aggravated character, I have exercised my discretion in favour of the peccant petitioner.

There is, however, no condonation in the present case, because years before the husband's adultery his wife had left and deserted him.

These matters were regarded more strictly in the old days, and I am not sure that the principle was not that, where the husband was the petitioner, acts of adultery on his part would disentitle him to a decree.

Now I must say what I find to be the facts here, so as to enable the parties to see exactly what the groundwork of the decision is.

I believe the story given by the petitioner in the witness-box; and that belief is strengthened after the evidence which has been given by the young woman who has unfortunately fallen and become a mother.

It is a strange case: it is a case unlike any other which I have heard.

I fully believe, however improbable in an ordinary state of things it would be, that this young woman, by reason of the state of her health, and the fear which the act produced in her, did not have any further connection after the act which resulted in the conception.

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The man has behaved well to her since. His conduct in retaining her in the house was not culpable. He was not committing adultery with her; but he was throwing his protection over the woman who had become the mother of a child by him.

I do not lay stress upon the story that he thought that seven years after separation from his wife he might marry. That does not excuse him in this case, because the act of adultery took place within the period of seven years. That really can be disregarded for the purposes of this case.

Unless there is to be a hard and fast line, that in no case, where there has been an act of adultery by the husband, is the discretion of the Court to be exercised in his favour, I think the circumstances of the present case are such as to justify the exercise of such discretion.

The wife will not be wronged: she has been separated from him for a long time, by her own act.

The young woman with whom adultery was committed will not be wronged. The child will not be wronged. On the contrary they will or ought to have secured to them the protection of the petitioner.

The probability is that if the discretion is not exercised in favour of the petitioner, there will be, in the future, an offence or offences against public morality; because it is hardly to be believed that these two people, if they are not able to marry, will remain chaste during the remainder of their lives, in the circumstances in which they are placed—a child binding the one to the other.

Therefore, in the interests of public morality, and in the interests of the young woman herself and of the little child, I think I am doing right, and am also acting in accordance with the true principles of justice, if, in the special circumstances of this case, I exercise my discretion in favour of the petitioner.

The decree, therefore, will not be rescinded, but will stand.

Barnard, K.C., asked for the King's Proctor's costs.

Grazebrook, for the petitioner, pointed out that, at an early stage of the proceedings, it was suggested that the matter might be disposed of on motion. Furthermore, a good deal of extra

expense had been incurred by reason of the suggestions put forward in the King's Proctor's subsequent reply to the effect that the petitioner had behaved improperly to his wife.

SIR SAMUEL EVANS, PRESIDENT. The ordinary rule as to costs must follow. Whether the order for costs will be enforced, or not, is another matter. But I give the King's Proctor the order for the costs of his intervention.

Solicitors: *Jaques & Co., for Armitage, Sykes & Hinchcliffe, Huddersfield; The King's Proctor.*

H. D. G.

IN THE ESTATE OF STRONG, DECEASED.
STRONG AND ANOTHER *v.* HADDEN AND OTHERS.

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[1914 S. 1979.]

Probate—Several Documents—Execution—Presumption: "Omnia praesumuntur rite esse acta"—Rebuttal—Evidence—Surrounding Circumstances.

In the absence of conclusive evidence as to the execution of a testamentary paper containing no attestation clause, the Court is entitled to have regard to the surrounding circumstances both in connection with the document itself and outside of it.

In the Goods of Frances Peverett [1902] P. 205 distinguished.

THE testatrix, Lizzie Blanche Strong, spinster, died at Wendover, Bucks, on April 8, 1913, leaving several testamentary documents purporting to be wills.

After prolonged inquiries and investigation, both the plaintiffs as beneficiaries, and the first of them as executrix, put forward, as the only valid document, a will signed "Lizzie Blanche Strong," bearing date March 30, 1885, written by a relative of the deceased, a barrister, since deceased, and attested by him and a Mr. Joseph Anderson.

The handwriting of all these persons was proved, as well as the death of Mr. Clement Strong, which occurred on November 28, 1889, and that of Mr. Joseph Anderson, which occurred in February, 1893.

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This will contained a full attestation clause.

Among the papers of the deceased were found, in addition to the will of March 30, 1885, three holograph wills, the first in order of date (December, 1885) having one attesting witness only; the next was dated August 7, 1909, and the last was undated, but in fact was executed in March, 1913. These last two documents each bore the signatures of two attesting witnesses, but with no attestation clause. The witnesses were called, and the result of their evidence is stated in the judgment of the learned President.

There were several defendants, but only two of them pleaded. Of these two, the Society for the Propagation of the Gospel in Foreign Parts, who were named as legatees in the will of August 7, 1909, merely submitted to the judgment of the Court and gave notice under Rules of the Supreme Court, Order xxi., r. 18, that they would not call any witnesses and only intended to cross-examine the witnesses called on the other side; but the Royal Society of Musicians contested the execution of the will propounded by the plaintiffs, and, alternatively, pleaded that the same was revoked by the will dated August 7, 1909, or, in the further alternative, by the undated will executed in March, 1913, and they asked that one of these later documents should be pronounced for.

H. Durley Grazebrook, for the plaintiffs.

R. J. Willis (*D. Cotes Preedy* with him), for the Society for the Propagation of the Gospel in Foreign Parts.

A. H. Spokes, for the Royal Society of Musicians.

[SIR SAMUEL EVANS, PRESIDENT, referred to *In the Goods of Frances Peverett.* (1)]

H. Durley Grazebrook. In that case there were no circumstances to guide the Court in coming to a conclusion as to whether the document in question was duly executed or not. In this case, apart from the appearance of one of the later documents, there is evidence outside those documents. The Court can look at the will of December, 1885, which has only one witness.

(1) [1902] P. 205.

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SIR SAMUEL EVANS, PRESIDENT. This case is extremely near the line.

In the course of the argument I called attention to the case of *Peverett* (1), in deciding which Sir Francis Jeune said that he was going to the furthest limit in favour of the presumption of law in favour of a will, where there were no surrounding circumstances at all.

On the whole, I have come to the conclusion that the document dated August 7, 1909, was not executed and attested in accordance with the provisions of the Wills Act.

The external surrounding circumstances regarding the matter are these: In December, 1885, the testatrix signed a holograph document, in which the phraseology is to a great extent the same, and she signed this document with only one witness to it.

In 1913, when she was in Rome, she signed another holograph document, which, after hearing the evidence of Miss de Lacy, one of the two ladies whose names appear thereon as witnesses, I am satisfied was not duly executed, there having been no signature or acknowledgment by the testatrix in the presence of the two witnesses present at the same time.

With regard to the document really in question here, the two attesting witnesses, Miss Perrott and Mrs. Bell, have both been called before me. Miss Perrott, the stronger of the two, *thinks* she never attested the will in the presence of Mrs. Bell, her state of mind is that she does not remember doing it; "I don't think I did, because, if I had attested it with Mrs. Bell, I think I should have remembered it"; and, in the statement that she signed and which was put to her in cross-examination by the plaintiffs' counsel, she stated, "I am confident that the will was not signed by the deceased in my presence, and that I never witnessed the signature of the deceased to any document in the presence of Mrs. Bell, the other attesting witness."

So far as the evidence has been forthcoming, it is, therefore, against this will.

Then I look at the document itself, although if this had afforded the only evidence, I do not think I should have trusted

(1) [1902] P. 205.

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to a decision based upon the impressions I have formed upon this alone.

Mrs. Bell's signature appears to have been written with different ink, and certainly with a different pen, from that used by Miss Perrott in her signature, and this circumstance lends some weight to the theory that these two ladies signed this will at different times.

Upon the whole, this case is distinguishable from that of *Peverett*. (1)

I pronounce in favour of the document propounded by the plaintiffs, and against the documents put forward by the defendants.

Solicitors for plaintiffs: *Hemsley & Co.*

Solicitors for the Society for the Propagation of the Gospel in Foreign Parts: *Nicholl, Manisty & Co.*

Solicitors for the Royal Society of Musicians: *Burgoynes & Co.*

(1) [1902] P. 205.

H. D. G.

IN THE HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY.

[IN PRIZE.]

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July 12, 15, 16, 20, 21, 22, 23, 26, 27, 28, 29, 30; *Aug.* 2, 3; *Sept.* 16.

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[1914 Nos. 405, 395, 342, 384.]

Prize Court—Evidence in Prize Cases—Contraband, Absolute and Conditional—Continuous Voyage—Ultimate Hostile Destination—Orders in Council of August 20 *and October* 29, 1914.

In prize proceedings the Court is not governed or limited by the strict rules of evidence which bind our municipal courts, as it has always been deemed right to recognize well-known facts which have come to light in other cases or as matters of public reputation: see per Lord Stowell in *The Rosalie and Betty* (1800) 2 C. Rob. 343, and the judgment in an American authority, *The Stephen Hart* (1863) Blatch. Prize Cases, 387, at p. 403; but when any presumptions or inferences have to be considered, any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will press heavily against those adopting such courses. Neutrals are expected to conduct their neutral trade during war not only without having recourse to fraud or false papers, but with candour and straightforwardness, that is to say (in the words of the American Supreme Court), "Belligerents are entitled to require of neutrals a frank and bona fide conduct." Hence the Court came to the conclusion that the use of the word "gum," in the papers of one of the above ships, was not an accurate commercial description, and its use in the manifest instead of the appropriate commercial description of "rubber," or various qualities of rubber by their commercial names, was adopted in order to avoid the inconvenience or difficulties which would result from a search and possible capture. The Court further found that the charterers of the vessel were responsible for the misdescription and that the sale of the goods in question to one consignee and the purchase and payment for them by him were honest business transactions; but, in respect of another parcel, the Court held that the alleged purchaser had not made out his claim to be the owner of the goods, that he knew of the description "gum" being applied to them, that the rubber was on its way to enemy

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territory through the German Consul at Landskrona in Sweden, and that rubber having been declared absolute contraband the parcel in question was confiscable.

The doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage over land, became part of the law of nations prior to the commencement of the present war, and, in applying the principles of international law to the doctrine, regard must be had to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it": see *The Jonge Margaretha* (1799) 1 C. Rob. 189. Accordingly the Court, in respect of the present cases before it, was not restricted in its vision to the primary consignment of goods from New York to the neutral port of Copenhagen, but was entitled and bound, when the doctrine was applied to the carriage of contraband, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was: see *The William* (1806) 5 C. Rob. 385; *The Bermuda* (1865) 3 Wall. 514; for according to the view of Bluntschli, "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

The consignment to "order or assigns," without naming any consignee, is a circumstance which has been regarded as important *in time of war* in determining the real or ostensible destination at the neutral port.

Guided by the above considerations, the President (Sir Samuel Evans) held that the cargoes of the four vessels before the Court (other than the portions acquired by persons in Scandinavia whose claims were allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery, but that the cargoes were, by the intention of the shippers, on their way, at the time of capture, to German territory as their actual and real destination, and that, in the circumstances, the cargoes must be condemned as lawful prize: for, from the facts proved, and the reasonable inferences from them, it was to be presumed (whether either or both the Orders in Council of August 20 and October 29, 1914, were deemed effective and binding, or not) that these goods were destined for the use of the German Government or its naval or military forces, and, further, that if the conclusions arrived at were only accurate as to a substantial proportion of the goods the whole would be affected, because contraband articles are said to be of an infectious nature, and contaminate the whole cargo belonging to the same owners.

THE above named four vessels, of which the first three were Norwegian, and the fourth Swedish, were, when captured by British forces, under time charters to an American corporation,

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the Gans Steamship Line, of which company the president, John H. Gans, was a German, and the general agent of the company in Europe was also a German. The four vessels started within a period of three weeks in October and November, 1914 (the last three on October 20, 27, and 28 respectively, the first on November 11), on voyages from New York to Copenhagen, with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs. Two of them (the *Fridland* and the *Kim*) were in part laden with rubber, and one of them (the *Kim*) with hides. The total cargoes of the four vessels amounted to 73,237,796 lbs. in weight, and the claims covered 32,312,479 lbs., exclusive of the rubber and hides. The vessels were captured on the voyage (the *Alfred Nobel* on November 5, the *Fridland* on November 10, the *Bjornsterjne Bjornson* on November 11, and the *Kim* on November 28, 1914), and their cargoes were seized on the ground that they were conditional contraband, with the exception of one parcel of rubber on the *Kim* which under the Order in Council of October 29, 1914, was seized as absolute contraband.

The questions before the Court related only to the cargoes. Questions as to the capture and confiscation of the ships were reserved for argument hereafter.

An Order in Council adopting with modifications the provisions of the instrument known as the "Declaration of London" was promulgated on August 20, 1914, and another on October 29. Proclamations as to contraband, absolute and conditional, were issued on August 4, September 21, and October 29, 1914. By the Proclamation of August 4 all the goods now claimed (other than rubber and hides) were declared to be conditional contraband.

The Attorney-General (*Sir Edward Carson*), *the Solicitor-General* (*Sir F. E. Smith*), *Cave, K.C.*, *R. A. Wright*, *Pearce Higgins*, and *J. Wylie*, for the Crown.

Sir Robert Finlay, K.C., *Laing, K.C.*, and *W. N. Raeburn*, for Armour & Co.

Sir Robert Finlay, K.C., *Leslie Scott, K.C.*, and *W. N. Raeburn*, for various Danish consignees.

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Leslie Scott, K.C., and *C. R. Dunlop*, for American shippers, Morris & Co. and Stern & Co.

Leslie Scott, K.C., and *R. H. Balloch*, for the owners of the *Fridland*.

Maurice Hill, K.C., and *A. Neilson*, for Sulzberger & Co.

Maurice Hill, K.C., and *J. B. Aspinall*, for the Cudahy Packing Company.

Ernest Pollock, K.C., and *C. F. Lowenthal*, for Swift & Co. and Hammond & Co.

F. D. MacKinnon, K.C., and *W. N. Raeburn*, for Fearon, Brown & Co.

A. D. Bateson, K.C., and *D. Stephens*, for Fearon, Brown & Co. (wheat cargo).

Adair Roche, K.C., and *R. H. Balloch*, for the owners of the *Kim*, the *Alfred Nobel*, and the *Bjornsterjne Bjornson*.

Dawson Miller, K.C., and *A. Neilson*, for Ullman & Co. (consignees of rubber).

E. W. Brightman, for claimants of rubber on the *Kim*.

Douglas Hogg, for W. T. Baird.

H. C. S. Dumas, for the Guaranty Trust Company of New York and other shippers of grain, and for various consignees.

The Attorney-General for the Procurator-General on behalf of the Crown, in the case of the *Kim*, suggested that it would be convenient if the cases of the *Alfred Nobel*, the *Bjornsterjne Bjornson*, and the *Fridland* were dealt with at the same time, as with some minor distinctions the main points at issue, as regards the claimants, the nature of the cargoes, and their destination, were practically the same, and in fact there were some thirty-eight ships whose cargoes involved similar points to be decided.

The Court assented to the suggestion, and in opening all four cases the Attorney-General pointed out that an explanation of the situation was derived from the consideration that, on the war breaking out, Copenhagen was turned into a depot for the feeding of the enemy's troops and garrisons all along the coast, as the Germans were unable to carry on their trade, in the way it had been done, from Hamburg or from Stettin, and, that trade being

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stopped, it was diverted to Copenhagen with a view to regard, and to use, that port as being—as it was in fact—a neutral port, and that there were neutral subjects in America dealing with this neutral port in neutral ships. The arguments of the Attorney-General based upon this assumption and applied to the details of each parcel of goods will be found fully stated in the judgment.

As to the claimants, the facts as to their cases may be shortly summarized thus:

Four large American firms were consignors of goods on each of the four vessels, and a fifth on two of them, the total amount of lard and meat products being 23,274,584 lbs. These five claimants, as shippers and consignors of the goods, alleged that the goods had remained their property, and based their claims upon ownership at the time of seizure. The other claimants were persons or firms chiefly in Denmark. They claimed that they had become the purchasers of goods (lard, cotton oil, beef casings, oleo stock, fat backs, smoked bacon and beef tongues) laden on the various vessels. A firm of Ullman & Co. claimed rubber on the *Fridland* and the *Kim* alleged to have been bought from a firm of E. Maurer & Co. W. T. Baird claimed rubber on the *Kim* amounting to 29,771 lbs. A firm of Marcus & Co. claimed hides on the *Kim* amounting to 18,968 lbs. The Guaranty Trust Company of New York claimed wheat and flour on the *Bjornsterjne Bjornson* and the *Fridland*. Armour & Co.'s direct claim was to nearly eight million lbs. of food-stuffs, chiefly lard, and adding the amounts of their alleged vendee's claims, the total was over 9½ million lbs. This large quantity was consigned to their agent at Copenhagen within one month, being about twenty times the quantity of lard exported from the United States to all Scandinavia in the corresponding period of the previous year, and Armour & Co.'s shipments to Copenhagen of hog products from October to December, 1914, were approximately equivalent to their total shipments to Copenhagen during the whole preceding eight years. The claim of Armour & Co. was based on the ground that the goods were their property as neutrals, shipped on neutral vessels, and consigned to neutrals at a neutral port, and that the goods were not intended for sale

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to or use by or on behalf of an enemy government or the armed forces of an enemy, the affidavit filed in support of the claim stating that "the whole of the said goods were shipped to the order of the agent in Copenhagen for sale in the agent's own district in the ordinary course of business." The portion of the shipments consisting of canned beef in tins was not suitable for civilian markets, and could only have been intended for the use of troops in the field.

As to the claims of Cudahy & Co. in respect of 176,559 lbs. of lard and beef casings shipped (before the Order in Council of October 29) on the *Alfred Nobel* and the *Fridland*, the Court came to the conclusion that these goods were on their way to Denmark as their real and bona fide destination, and were intended to be imported on their arrival into the common stock of the country. Further details in respect of each separate parcel of goods will be found fully set out in the judgment.

Cur. adv. vult.

Sept. 16. THE PRESIDENT (SIR SAMUEL EVANS). The cargoes which have been seized, and which are claimed in these proceedings, were laden on four steamships belonging to neutral owners, and were under time charters to an American corporation, the Gans Steamship Line. John H. Gans, the president of the company, is a German. He has resided in America for some years; but he has not been naturalized. The general agent of the company in Europe was one Wolenburg of Hamburg.

The four ships were the *Alfred Nobel* (Norwegian), the *Bjornsterjne Bjornson* (Norwegian), the *Fridland* (Swedish), and the *Kim* (Norwegian). They all started within a period of three weeks in October and November, 1914, on voyages from New York to Copenhagen with very large cargoes of lard, hog and meat products, oil stocks, wheat and other foodstuffs; two of them had cargoes of rubber, and one of hides. They were captured on the high seas, and their cargoes were seized on the ground that they were conditional contraband, alleged to be confiscable in the circumstances, with the exception of one cargo of rubber which was seized as absolute contraband.

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The Court is now asked to deal only with the cargoes. All questions relating to the capture and confiscability of the ships are left over to be argued and dealt with hereafter.

t is necessary to note the various dates of sailing and capture. They are as follows :—

	Date of sailing.	Date of capture.
Alfred Nobel	October 20, 1914	November 5, 1914
B. Bjornson	„ 27, „	„ 11, „
Fridland	„ 28, „	„ 10, „
Kim	November 11, „	„ 28, „

Upon some of these dates may depend questions touching what Orders in Council are applicable. One Order in Council adopting with modifications the provisions of the Convention known as the "Declaration of London" was promulgated on August 20, 1914, and another on October 29, 1914. Proclamations as to contraband, absolute and conditional, were issued on August 4, September 21, and October 29, 1914.

It is useful to note here, in order to avoid any possible misconception or confusion, that the later Order in Council of March 11, 1915 (sometimes called the Reprisals Order), does not affect the present cases in any way.

Before proceeding to state the result of the examination of the facts relative to the respective cargoes and claims, a general review may be made of the situation which led up to the dispatch of the four ships with their cargoes to a Danish port.

Notwithstanding the state of war, there was no difficulty in the way of neutral ships trading to German ports in the North Sea, other than the perils which Germany herself had created by the indiscriminate laying and scattering of mines of all description, unanchored and floating outside territorial waters in the open sea in the way of the routes of maritime trade, in defiance of international law and the rules of conduct of naval warfare, and in flagrant violation of the Hague Convention to which Germany was a party. Apart from these dangers neutral vessels could have, in the exercise of their international right, voyaged with their goods to and from Hamburg, Bremen, Emden, and any other ports of the German Empire. There was no blockade involving risk of confiscation of vessels running or

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attempting to run it. Neutral vessels might have carried conditional and absolute contraband into those ports, acting again within their rights under international law, subject only to the risk of capture by vigilant warships of this country and its allies. But the trade of neutrals—other than the Scandinavian countries and Holland—with German ports in the North Sea having been rendered so difficult as to become to all intents impossible, it is not surprising that a great part of it should be deflected to Scandinavian ports from which access to the German ports in the Baltic and to inland Germany by overland routes was available, and that this deflection resulted, the facts universally known strongly testify. The neutral trade concerned in the present cases is that of the United States of America; and the transactions which have to be scrutinized arose from a trading, either real and bona fide, or pretended and ostensible only, with Denmark, in the course of which these vessels' sea voyages were made between New York and Copenhagen.

Denmark is a country with a small population of less than three millions; and is, of course, as regards foodstuffs, an exporting, and not an importing, country. Its situation, however, renders it convenient to transport goods from its territory to German ports and places like Hamburg, Altona, Lübeck, Stettin, and Berlin.

The total cargoes in the four captured ships bound for Copenhagen within about three weeks amounted to 73,237,796 lbs. in weight. (These weights and other weights which will be given are gross weights according to the ships' manifests.) Portions of these cargoes have been released, and other portions remain unclaimed. The quantity of goods claimed in these proceedings is very large. Altogether the claims cover 32,312,479 lbs. (exclusive of the rubber and hides). The claimants did not supply any information as to the quantities of similar products which they had supplied or consigned to Denmark previous to the war. Some illustrative statistics were given by the Crown, with regard to lard of various qualities, which are not without significance, and which form a fair criterion of the imports of these and like substances into Denmark before the war; and they give a

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measure for comparison with the imports of lard consigned to Copenhagen after the outbreak of war upon the four vessels now before the Court.

The average annual quantity of lard imported into Denmark during the three years 1911—1913 from all sources was 1,459,000 lbs. The quantity of lard consigned to Copenhagen on these four ships alone was 19,252,000 lbs. Comparing these quantities, the result is that these vessels were carrying towards Copenhagen within less than a month more than thirteen times the quantity of lard which had been imported annually to Denmark for each of the three years before the war.

To illustrate further the change effected by the war, it was given in evidence that the imports of lard from the United States of America to Scandinavia (or, more accurately, to parts of Europe other than the United Kingdom, France, Belgium, Germany, the Netherlands, and Italy) during the months of October and November, 1914, amounted to 50,647,849 lbs. as compared with 854,856 lbs. for the same months in 1913—showing an increase for the two months of 49,792,993 lbs.; or in other words the imports during those two months in 1914 were nearly sixty times those for the corresponding months of 1913.

One more illustration may be given from statistics which were given in evidence for one of the claimants (Hammond & Co. and Swift & Co.): In the five months August—December, 1913, the exports of lard from the United States of America to Germany were 68,664,975 lbs. During the same five months in 1914 they had fallen to a mere nominal quantity, 23,800 lbs. On the other hand, during those periods, similar exports from the United States of America to Scandinavian countries (including Malta and Gibraltar, which would not materially affect the comparison) rose from 2,125,579 lbs. to 59,694,447 lbs. These facts give practical certainty to the inference that an overwhelming proportion (so overwhelming as to amount to almost the whole) of the consignments of lard in the four vessels we are dealing with was intended for, or would find its way into, Germany. These, however, are general considerations, important to bear in mind in their appropriate place; but not in any sense conclusive upon the serious questions of consecutive voyages,

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of hostile quality, and of hostile destination, which are involved before it can be determined whether the goods seized are confiscable as prize.

The dates of sailing and capture have been given with an intimation that they may have a bearing upon the law applicable to the cases.

The *Alfred Nobel*, the *Bjornsterjne Bjornson*, and the *Fridland* started on their voyages in the interval between the making of the two Orders in Council of August 20 and October 29. The *Kim* commenced her voyage after the latter Order came into force.

By the Proclamation of August 4 all the goods now claimed (other than the rubber and the hides) were declared to be conditional contraband. The cargoes of rubber seized were laden on the *Fridland* and the *Kim*. Rubber was declared conditional contraband on September 21, 1914, and absolute contraband on October 29. Accordingly the rubber on the *Fridland* was conditional contraband; and that on the *Kim* was absolute contraband.

The hides were laden on the *Kim*. Hides were declared conditional contraband on September 21, 1914. No contention was made on behalf of the claimants that the goods were not to be regarded as conditional or absolute contraband, in accordance with the respective Proclamations affecting them, that is to say, it was admitted that the goods partook of the character of conditional or absolute contraband under the said Proclamations, and were to be dealt with accordingly.

The law can best be discussed and can only be applied after ascertaining the facts. The details relating to the ships and their cargoes which it has been necessary to examine are very voluminous. I must try to summarize them for the purposes of this judgment, in order to make it intelligible in principle, and in the results. To attempt to give even a moderate proportion of the details would tend to bewildering confusion.

The number of separate bills of lading covering the cargoes on the four vessels is about 625.

Four large American firms were consignors of goods on each of the four vessels; and a fifth on two of them.

According to the figures given to the Court, those five American

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firms were consignors of lard and meat products to the following extent :—

	Lbs.
Armour & Co.	9,677,978
Morris & Co. (with Stern & Co.) . .	6,868,213
Hammond & Co. (with Swift & Co.) . .	3,397,005
Sulzberger and Sons Co.	2,602,009
Cudahy & Co.	729,379
This makes up a total of . .	23,274,584

These figures I accept as substantially correct. They were given by the law officers of the Crown. The other figures in my judgment I am responsible for.

Those portions of the cargoes which have been released, and those which have not been claimed, will be dealt with in a separate judgment. There is some overlapping, as some parts of the cargoes have been claimed by the consignors, and also by some alleged vendees. For these and other reasons some corrections in the figures which follow may become necessary; but they are substantially correct as they stand in the various documents, and as they were dealt with at the hearing; and certainly sufficiently accurate for the purpose of determining all questions relating to the rights of the Crown to condemnation, or of the various claimants to release.

An analysis of the claims shows the following results :—

I.—MORRIS & Co. (with STERN & Co.).

	Lbs.
Direct claims by these companies to goods laden on the four ships amounting to	5,176,327

Other sub-claims by claimants who allege that they had bought and had become owners of goods consigned by the above companies :—

	Lbs.
(1.) Pay & Co.—	
Goods on the *A. Nobel* and the *B. Bjornson* . . .	411,660
(2.) Christensen and Thoegersen—	
Goods on the *A. Nobel* and the *B. Bjornson* . . .	110,428

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(3.) Brödr Levy—			
Goods on the *A. Nobel*, the *B. Bjornson*, and the *Kim* .		Lbs. 132,036	Lbs.
(4.) J. O. Hansen—			
Goods on the *B. Bjornson*, *Fridland*, and *Kim* . . .		196,873	
(5.) Segelcke—			
Goods on the *B. Bjornson* and the *Kim*		275,297	
(6.) Pedersen—			
Goods on the *B. Bjornson* .		45,219	
(7.) Henriques and Zoydner—			
Goods on the *B. Bjornson* .		81,096	
(8.) Korsor Margarin Fabrik—			
Goods on the *Fridland* and the *Kim*		26,639	
(9.) Margarin Fabrik Dania—			
Goods on the *Fridland* . .		9,004	
(10.) Erik Valeur—			
Goods on the *Kim* . . .		106,155	
		———	1,394,407
Total . . .			6,570,734

II.—ARMOUR & Co.

Direct claims by this company to goods laden on the four ships amounting to		Lbs. 7,819,003
Other sub-claims by claimants who allege that they bought and became owners of goods consigned by Armour & Co. as follows:—		
(1.) Provision Import Company—		
Goods on the *A. Nobel* and the *Fridland*	Lbs. 1,176,050	
(2.) Christensen and Thoegersen—		
Goods on the *Fridland* . .	244,000	
(3.) Brödr Levy—		
Goods on the *Kim* . . .	231,391	

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(4.) J. O. Hansen—	Lbs.	Lbs.	
Goods on the *Kim* . . .	203,752		THE KIM.
(5.) Frigast—			THE ALFRED NOBEL.
Goods on the *B. Bjornson* .	15,750		THE BJORN-STERJNE BJORNSON.
		1,870,943	
Total . . .		9,689,946	THE FRIDLAND.

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III.—SWIFT & Co. and HAMMOND & Co.

Direct claims by these companies to goods laden on the four ships		Lbs. 2,512,912
Other sub-claims by claimants who allege that they had bought and had become the owners of goods consigned by the above companies:—		
(1.) Buch & Co.—		
Goods on the *B. Bjornson*, the *Fridland*, and the *Kim* .	Lbs. 752,908	
(2.) Bunchs Fedevare Forretning—		
Goods on the *Fridland* . .	3,371	
		756,279
		3,269,191

IV.—SULZBERGER AND SONS COMPANY.

Direct claims by this company to goods laden on the four ships		Lbs. 1,700,281
Other sub-claims by claimants who allege that they had bought and had become the owners of goods consigned by the above company:—		
(1.) Pay & Co.—	Lbs.	
Goods on the four ships . .	845,783	
(2.) V. Elwarth—		
Goods on the *A. Nobel* . .	88,618	
		934,401
		2,634,682

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V.—CUDAHY & Co.

Direct claims by this company to goods laden on the *A. Nobel* and the *Fridland* . . . . . Lbs. 176,559

Other sub-claims by claimants who allege that they had bought and had become the owners of goods consigned by the above company:—

(1.) Christensen and Thoegersen—
Goods on the *A. Nobel* and the *Fridland* . . . . . Lbs. 594,682

(2.) V. Elwarth—
Goods on the *A. Nobel* . . . 61,000

655,682

832,241

These five claimants were the shippers and consignors of the goods; they allege that the goods had remained their property, and base their claims upon ownership at the time of seizure.

The other claimants are persons or firms chiefly in Denmark, who claim that they had become the purchasers of goods laden on the various vessels. They are as follows:—

A.—Pay & Co. claim goods laden on the four vessels amounting to . . . . . Lbs. 1,710,868

They claim as having bought from:—

(1.) Morris & Co.
(2.) Sulzberger and Sons Co., and
(3.) The South Cotton Oil Co.

1,710,868

The goods these claimants say they bought were:—
Lard, cotton oil, beef casings, and oleo stock.

B.—The Provision Import Company claim goods on the *A. Nobel* and the *Fridland* amounting to . Lbs. 1,176,050

They claim as having bought from Armour & Co.

The goods consist of:—
Lard and oleo stock.

C.—Christensen and Thoegersen claim goods on the *A. Nobel*, the *B. Bjornson*, and the *Fridland* amounting to 949,110

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They claim as having bought from :—
(1.) Morris & Co.
(2.) Cudahy & Co., and
(3.) Armour & Co.
The goods consist of :—
Lard and casings.

D.—Brödr Levy claim goods on the *A. Nobel*, the *B. Bjornson*, and the *Kim* amounting to . . . Lbs. 363,427
They claim as having bought from :—
(1.) Morris & Co. and
(2.) Armour & Co.
The goods consist of :—
Lard and fat backs.

E.—Vilhelm Elwarth claims goods on the *A. Nobel* amounting to 149,618
He claims as having bought from :—
(1.) The Consolidated Rendering Co. and
(2.) Cudahy & Co.
The goods consist of :—
Lard and oleo stock.

F.—Buch & Co. claim goods on the *B. Bjornson*, the *Fridland*, and the *Kim* amounting to . . . 752,908
They claim as having bought from Hammond & Co.
The goods consist of :—
Lard, fat backs, and smoked bacon.

G.—J. O. Hansen claims goods on the *B. Bjornson*, the *Fridland*, and the *Kim* amounting to . . . 400,625
He claims as having bought from :—
(1.) Morris & Co. and
(2.) Armour & Co.
The goods consist of :—
Lard and fat backs.

H.—Segelcke claims goods on the *B. Bjornson* and the *Kim* amounting to 275,297
He claims as having bought from Morris & Co.
The goods consist of :—
Lard and fat backs.

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Lbs.

J.—Pedersen claims (for the Faellesforingen Company) goods on the *B. Bjornson* amounting to . . 45,219
He claims as having bought from Morris & Co.
The goods consist of:—
Lard.

K.—Henriques and Zoydner claim goods on the *B. Bjornson* amounting to 81,096
They claim as having bought from Morris & Co.
The goods consist of:—
Lard.

L.—Frigast claims goods on the *B. Bjornson* amounting to 15,750
He claims as having bought from Armour & Co.
The goods consist of:—
Lard.

M.—Korsor Margarin Fabrik claim goods on the *Fridland* and the *Kim* amounting to 26,639
They claim as having bought from Morris & Co.
The goods consist of:—
Oleo stock.

N.—The Margarin Fabrik Dania claim goods shipped on the *Fridland* amounting to . . . 9,004
They claim as having bought from Morris & Co.
The goods consist of:—
Lard.

O.—Bunchs Fed. claim goods on the *Fridland* amounting to 3,371
They claim as having bought from Christensen and Thoegersen goods shipped by Hammond & Co.
The goods consist of:—
Beef tongues.

P.—Erik Valeur claims goods on the *Kim* amounting to 106,155
He claims as having bought from Morris & Co.
The goods are:—
Oleo stock.

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	Lbs.
Q.—Christian Loehr claims goods on the *A. Nobel* amounting to	41,952
He claims as having bought from the Provision Import Company goods shipped by Rumsay & Co.	
The goods consist of:—	
Lard.	
R.—J. Ullman & Co. claim rubber on the *Fridland* and the *Kim* amounting to	137,637
They claim as having bought the rubber from E. Maurer & Co.	
S.—W. T. Baird claims rubber on the *Kim* amounting to	29,771
He claims the rubber which he himself had consigned to Fritsch, of Landskrona.	
T.—Marcus & Co. claim hides on the *Kim* amounting to	18,968
They claim as having bought the hides from Amsinck & Co. or, through them, from Goldtree and Liebes, of Santa Ana.	
U.—The Guaranty Trust Company of New York claim (with Newman) goods on the *A. Nobel*, and (with Morris & Co.) goods on the *B. Bjornson*, and the *Fridland*, amounting to	8,795,108
They claim as consignors of goods which consist of:—	
Wheat and flour.	

The first steamship which sailed was the *Alfred Nobel*. The chief shippers on this vessel were:—

(1.) Morris & Co.; and

(2.) Armour & Co.

The direct claims of these two companies in respect of goods laden by them on this vessel are:—

Morris & Co. . . . . 1,574,091 lbs.

and

Armour & Co. . . . . 1,537,913 ,,

It will be convenient to investigate the cases of these shippers first in this order, both as regards the *Alfred Nobel* and the

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other three steamers, upon all of which these two companies were heavy consignors.

As to Morris & Co.'s Claim.

This meat packing company of Chicago and New York at the beginning of the war had a large business with Germany, which they carried on, at the Europe end, at Hamburg. They had in their employ at Hamburg two persons named McCann and Fry. Fry was their manager. They appear to have had an agent also at Copenhagen of the name of Conrad Bang. The transactions relating to their shipments of between six-and-a-half and seven million lbs. of products on the four vessels were carried through by McCann and Fry, and not by Bang. Not long after the war began McCann and Fry left Hamburg and took up their quarters at Copenhagen. McCann was named in hundreds of the bills of lading in which Morris & Co. were the shippers as the "party to be notified." He was so named in all, with a few exceptions which are insignificant.

He had no business at Copenhagen or in Denmark before the war. He had apparently no office in Copenhagen. His address was "the Bristol Hotel."

The instructions to him from Morris & Co. as to the change from Hamburg to Copenhagen, and as to the initiation and progress of the business transactions carried on either at or through Copenhagen, must have been in writing unless he visited America, or some one from America visited him. No such instructions were produced in evidence and no explanation was given of them. Not a single letter passing between Morris & Co. and McCann or Fry was produced. A few telegrams were in evidence, but that was due to their having been intercepted by the British Censor, and they were put before the Court by the Procurator-General. McCann did not even make an affidavit in explanation of his own part of the transactions. Nor did Fry. Affidavits from them, if they comprised a complete and truthful statement of the facts within their knowledge, would have been of value and assistance to the Court.

On November 28 McCann and Fry together formed a company in Copenhagen under the name of the "Dansk Fed. Import

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Kompagnie." Its capital was only about 120*l.* (2000 kronen); but it imported lard and meat by the end of the year (i.e., in about five weeks) to the value of about 280,000*l.* (5,000,000 kronen). Later on, McCann is cabling from Copenhagen to Morris & Co. in New York, "Don't ship any lard Copenhagen, export prohibited."

Afterwards, goods like lard and fat backs were consigned by Morris & Co. to Genoa—Italy had not then joined in the war.

The evidence put forward in support of the direct claim of Morris & Co. was an affidavit of Mr. Harry A. Timmins which was sworn in Chicago on May 27, 1915. Mr. Timmins is the assistant secretary and treasurer of the company. The case which he there makes is that the goods had been sent to Copenhagen in the ordinary course of the business of the company in Denmark itself.

It is advisable to set out the main paragraphs verbatim :—

"2. The claimant (Morris & Co.) has for many years shipped considerable quantities of its products to Denmark, both directly to Copenhagen and through adjacent branch houses. The sale of such products for several years was made either through the Morris Packing Company, a corporation of Norway, or an individual salaried employee of the claimant. Said Morris Packing Company or said salaried individual employee of claimant always had strict instructions from the claimant to confine sales to Denmark, Scandinavian countries, and Russia, and not to sell to any other countries owing to the fact that the claimant has agents in other countries, and it is essential that said agent's operations be strictly confined to his own district.

"4. In the month of October, 1914, the claimant shipped on board the Norwegian steamship *Alfred Nobel* [the paragraphs in the affidavits relating to the other three steamships are identical] the goods particulars of which are set out in the schedule to this affidavit. The whole of said goods was shipped 'to order' Morris & Company, notify claimant's agent in Copenhagen (said agent being a native born citizen of the United States of America) for sale on consignment in the agent's own district in the ordinary course of business. The standing instructions to the agent that

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no sales were to be made outside the agent's district were never withdrawn by the claimant."

The deponent refrains from giving any particulars or even summaries of the "considerable" quantities of the company's products shipped to Copenhagen or Denmark for the years before the war; he does not even say what the "products" shipped were; but the impression clearly intended to be produced was that the goods on the four ships in question were sent in the Denmark business, and were not to be sold by the "salaried employee" or "agent" in other countries "outside the agent's district."

There is no reference to any German market to be supplied from Denmark. Germany is not even mentioned.

The "agent" in Copenhagen is carefully described as "a native born citizen of the United States of America," but otherwise he is left shrouded in anonymity. Mr. McCann was his name. His collaborator, Fry, is not mentioned. Nor is the company (the Dansk Fed. Kompagnie) which they formed in November, 1914, disclosed. For aught the affidavit says or suggests, the business attentions of Mr. McCann might have been confined for many years before the war to the comparatively humble and quiet Danish or Scandinavian district of the claimant's business. His and Fry's real business activity up to October, 1914, (we now know) was in the great centre of Hamburg.

The solicitors for the claimants had been instructed soon after the seizure to put forward the same kind of case, although more limited, because the authority was then said to be to sell only in Denmark to the exclusion of the rest of Scandinavia and Russia; for in a letter to the Procurator-General in December, 1914, they wrote: "The duty of the consignor's representative in Copenhagen was to sell only for delivery in Copenhagen against cash (except as to 800 tierces of lard shown in the table set out in our letter to you of the 11th inst. which were going to Christiania) and it was never the intention of the consignor's agent, nor had he any authority, to reship the goods from Copenhagen to another port." When Mr. Timmins swore his affidavit, that of the Procurator-General had not been filed, and Mr. Timmins had probably little

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or no idea of the information which had been gleaned for the Crown by the intercepted telegrams, letters, and otherwise. No further affidavit has been made by Mr. Timmins or any one else on behalf of these claimants, and no attempt has been made to deal with the materials which raise suspicion, or to elucidate circumstances involving doubt, in relation to the bona fides of the transactions and claim. Not a single original book of account, letter book, or any other of the usual commercial documents which must have been kept by or for Mr. McCann in Copenhagen has been produced.

This Court has on various occasions during the present war pointed out the importance of producing original documents fully and promptly when a claim is made, and particularly where the bona fides of the claim is put in question. In the circumstances I say without hesitation that the bare account given of the transactions in Mr. Timmins's affidavit is not only wholly insufficient, but is also disingenuous and misleading. The picture exhibited of the ordinary regular Danish trade carried on by Morris & Co., through Mr. McCann, is marred when alongside of it is seen the shipment and transport towards Copenhagen by this company of lard and meat products in less than a month more than quadrupling the annual quantity imported into Denmark from all sources for a year on the average of three years before the war.

In a letter dated November 25 in the "Ascher" correspondence (hereinafter referred to in connection with the claim of Cudahy & Co.), a firm of dealers in Hamburg well acquainted with the trade wrote from Hamburg: "We met Mr. McCann of the Morris Provision Company on 'Change to-day [that was at Hamburg] back from Copenhagen. He was very sceptical with regard to the *Alfred Nobel* affair, and rather inclined to the opinion that the provisions on board of that steamer would never be allowed to reach Copenhagen, because it was too open-faced a case of the lard being intended for Germany to expect any other result." This was disclosed to the claimants a couple of months before the conclusion of the trial, but they did not deem it necessary, or perhaps expedient, to trouble themselves to contradict or explain the statement. The only way it was dealt

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with at the trial was by their counsel submitting that the letter was not evidence. I will deal with this question later, when the correspondence will be more fully referred to.

From other parts of the case it is shown that one Erik Valeur also claimed to be an agent of Morris & Co. for Denmark, and to have acted as such in the sale of considerable quantities of the goods shipped on these vessels by Morris & Co. I will for convenience deal with this subject when I come to Valeur's claim. I note this, because the facts which will be there referred to have a bearing also upon the claim of Morris & Co., and also on their statement that their sole agent in Denmark was Mr. McCann.

I have already referred to a cablegram dispatched by McCann from Copenhagen to Morris & Co., at New York, on January 24, 1915. "Don't ship any lard Copenhagen, export prohibited." The export had been prohibited by the Danish Government on January 11.

This cablegram was of course subsequent in date to the seizure of the cargoes in these cases. Nevertheless it is neither immaterial nor unimportant. It testifies clearly to two things: that lard was not required by or for Denmark, and that the previous importation into Copenhagen was in the main, at any rate, a mere stage in its passage into Germany.

In connection with the prohibition against exportation of foodstuffs it is well known, as a matter of public reputation, that in order to avoid international difficulties the Scandinavian countries as neutrals, from good political motives, issued orders from time to time, prohibiting the export from the respective countries of goods like lard, smoked meat, and other foodstuffs, oleo stock, hides, and rubber. For details of such prohibitions reference may be made to the affidavit of Mr. Henry Fountain, of the British Board of Trade, sworn on June 1, 1915.

These are matters also which tend to throw light upon the question of the real destination of the goods nominally consigned to Copenhagen; and the Court is entitled to take them into consideration and to place them in the scales when weighing all the evidence.

In the course of the trial, upon the facts which had then been given in evidence, I addressed some questions to Mr. Leslie Scott,

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counsel for Morris & Co. I asked him whether in respect of the foodstuffs which Morris & Co. consigned to their own order, or to that of their agent at Copenhagen, and not to any independent consignee, he contended that they were "intended for a Danish market or for the German market."

His answer was: "My submission is that there is no evidence as to which they were intended for in regard to any specific consignment, but that it was expected that the great bulk would find its way to Germany ultimately is obvious." And that it was so expected by his clients, he said, was obvious.

Then I observed, "In other words, those goods would not have been sent to Denmark if the Germans were not close by?" and Mr. Scott answered, "That is obvious."

I then asked for information as to any merchant or person in Germany with whom Morris & Co. were in communication with reference to the shipments in question, which they expected would find their way into Germany.

The answer of their counsel was as follows. I will give the exact words, because there was some discussion as to what was said:—

"It must depend upon the facts, as to which I have no instructions or evidence. The position seems a fairly clear one —that before the war, Hamburg, of course, was the great centre of importation, not only for Germany, but for Denmark, and also probably largely for Norway and Sweden. Hamburg is the great free port of Northern Europe, and the bulk of the American foodstuffs went there, as your Lordship sees from the figures which were given in consequence of your question. After the war, and importation with that port stopping, two results happened—one was that the German demand for the civil population as before the war has to be met, and the neutral country, the United States, in the ordinary course of business, sets out to supply that demand. The second point is that the supply of Denmark and the other Scandinavian countries has to be met; but the particular importing ports of Germany being closed, the difference is that the great stream of produce going to Germany and the three Scandinavian countries goes to Scandinavian ports. Before the war, in the case of Morris &

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Co., they had agents in Germany. On the war breaking out, it is no use the agents remaining in Germany, but they go to Denmark. Mr. McCann goes to Denmark, and there is no question about that. They receive the consignments. That they should not be in communication at all with Germany and German buyers under those circumstances is obviously a ridiculous idea. No one would imagine it, and I do not suppose, apart altogether from any evidence in the case, that your Lordship, dealing with inferences of fact, would come to the conclusion that the representatives of Morris in Denmark were not in communication with any one in Germany. I am not here to put forward that suggestion."

At a later stage the learned counsel said, "It may be perfectly true that [the shippers] may have thought that the whole was intended—we know that the whole was not intended—for German consumption. I have never disputed it. I have always said the market through Copenhagen was Germany."

In connection with these statements, it is important to emphasize the point, which has already been adverted to, that the claimants, and McCann their representative, did not give the Court any information—all of which was within their power to give—as to the arrangements made for sending the "great bulk," or the "greater part," of the cargoes to Germany; as to who were the consignees, or the intended consignees; or as to what ports or places in Germany the cargoes were intended or expected to be sent.

In the course of a discussion at the trial (more particularly to be referred to in Armour's case) counsel for Morris & Co. expressed his readiness to produce evidence as to the amount of lard, bacon, and other products of the kind in question which Morris & Co. had supplied to Germany during the two or three years before the war.

No such evidence has since been produced, although any necessary adjournment for the purpose was offered.

Before concluding the statement of facts as to Morris & Co., two other matters have to be mentioned.

The first is that Stern & Co., in whose name certain goods were shipped, is a subsidiary company of Morris & Co., and

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the case of Stern & Co., by the request of counsel, was taken with Morris's claim, and treated as identical with it. The second is that the claims of ten claimants to certain parcels of goods shipped by Morris & Co. who allege they were owners of such goods as purchasers from the shippers will have to be dealt with; and that facts affecting Morris & Co.'s position relating to those sub-claims must be taken as supplemental to those already adverted to in dealing with their direct claim.

The legal questions which arise with regard to the real destination of the goods claimed by Morris & Co. are identical with those arising in other claims.

I will deal with these legal questions after the examination of the facts in all the cases.

As to Armour & Co.'s Claim.

This American company had before the war a subsidiary company—Armour & Co., Aktieselskab—at Copenhagen acting as agents. These agents (it is said) had always had strict instructions from the claimants to confine their sales to Denmark, other Scandinavian countries, Finland and Russia, and not to sell to any other countries, as the claimants had agents in other countries and the operations of each agent were to be strictly confined to his particular district.

The Copenhagen office was a small one; the staff consisted of a manager, clerk, office boy, and typist, according to the evidence of the Procurator-General; or of a manager, assistant salesman, chief accountant, assistant accountant, and office boy, according to the affidavit of Mr. Urion.

Before the war, the claimants' principal branch was at Frankfort, where their German business was carried on.

No information was given by the claimants as to what became of, or as to what was done at, this branch after the war.

As to the Copenhagen office, not even the name of the manager was given to the Court. No one from Copenhagen favoured the Court with any evidence as to the extensive transactions involved in the shipments by these claimants.

Armour & Co.'s direct claim is to nearly eight million lbs. of foodstuffs. When the amounts of their alleged vendees' claims

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are added, the total is over nine and a half million lbs. This enormous quantity was consigned to their agents at Copenhagen within one month. How came it to be sent? What were the instructions of the anonymous manager at the Copenhagen office with regard to its disposal? With the exception of comparatively small quantities of casings, canned beef, and fat backs, it was all lard of various qualities. The average monthly quantity of lard exported from the United States to all Scandinavia in October and November, 1913, was 427,428 lbs.; a year later, in about three weeks (from October 20 to November 11, 1914), it is shown that this one company was shipping to Copenhagen alone considerably over twenty times that quantity.

It was deposed by the Procurator-General that Armour & Co.'s shipments to Copenhagen of hog products from October to December, 1914, were approximately equivalent to their total shipments to Copenhagen during the whole preceding eight years. These figures were not contradicted or contested. In the course of the hearing an opportunity was given to the claimants to deal with these facts, and to produce evidence of what the imports into Germany by or through Armour & Co. of similar products were during the two or three years before the war. The Crown did not oppose any adjournment which might be necessary for this purpose. Sir Robert Finlay, as counsel for Armour & Co., said: "We will get that statement without delay as to the amount of those articles (namely, lard, bacon and other foodstuffs) exported in three years before the war into Germany by Messrs. Armour & Co." No such statement was produced; and therefore (as I intimated during the discussion) I have to decide upon the materials which had been placed before me at the conclusion of the hearing. The claim of Messrs. Armour & Co. (dated April 21, 1915) was made on the ground that the goods were their property as neutrals shipped on neutral vessels, and consigned to neutrals at a neutral port; and that the goods were not intended for sale to or use by or on behalf of an enemy Government, or the armed forces of an enemy. The main evidence in support of the claim was an affidavit sworn May 27, 1915, by Mr. Meeker, one of the vice-presidents and managers of Armour & Co. It is

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practically in the same terms as the affidavit sworn in support of the claim of Morris & Co. It is indeed a "common form" affidavit. The pith of it is that "the whole of the said goods were shipped to the order of the agent in Copenhagen for sale in the agent's own district in the ordinary course of business. The standing instructions to the agent that no sales were to be made outside the agent's district were never withdrawn by the claimants, and the agent had no authority to sell the goods except to firms established in Denmark, other Scandinavian countries, Finland, or Russia."

Germany is not named; and the impression conveyed, and clearly intended to be conveyed, was that the goods were shipped and consigned for purely Scandinavian business, as if the war had not intervened.

As to the shipment on the *Kim*, however, there was this additional paragraph:

"The s.s. *Kim* sailed from the port of New York on November 10, and up to that time the claimants had no knowledge whatever of the Order in Council of the British Government of October 29, 1914, which was not received by the State Department at Washington until after the said vessel had sailed."

That is not in accordance with the facts; for the Order in Council had been notified to the American Ambassador on October 30, and was published in New York on November 2.

Further affidavits were filed.

One was by Mr. Finney, which is wholly immaterial. Another was by Mr. Garside, dealing only with that part of the shipment which consisted of canned beef; to which reference will be made hereafter.

The last was by Mr. A. R. Urion, and was sworn about a week after the hearing in Court had commenced.

Mr. Urion deals with various matters before the war, but as to transactions after the outbreak of war he deposes as follows:

"Par. 6. None of the goods shipped by Armour & Co. to the Copenhagen Company subsequent to the outbreak of war were sold to the armed forces or to any Government department of Germany or to any contractor for such armed forces or

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Government department. About ninety per cent. of the goods were sold to firms who had been customers of the company and established in Denmark and Scandinavia for many years. These sales were all genuine sales, and payment was made against documents in the ordinary way, and on delivery Armour & Co.'s interest in the goods absolutely ceased."

It is to be observed that he does not specify what the goods were, or to whom or when they were sold. The statement about the genuine sales of 90 per cent. cannot refer to the goods in the four ships in question. Such a statement as to those goods would be wholly untrue; and when he talks about payment and delivery of the goods, that must refer to some other goods, because those now in question never were delivered. It is significant that in this last affidavit filed for the claimants Mr. Urion avoids altogether any explanation of the shipment, or sale, of the goods which his company now claim.

Part of the shipments consisted of canned beef in tins. The quantity was 5600 dozen tins of 24 oz. each net, equal to 100,800 lbs. There was evidence before me, on behalf of the Crown, that cases of this size were not usual for civilian markets; that large quantities of this particular brand of tinned meat in tins of that size had been offered for use in the British Army; and that these packages could only have been intended for the use of troops in the field.

Evidence was given for the claimants to the contrary. But it is important to observe that no evidence was given that a single tin of that kind had ever been sent by Armour & Co. into Denmark before the war; nor, indeed, that any had been sent theretofore to Germany for the civilian population.

I do not say that it was proved that none were so sent. But it was not proved that any had been sent. Mr. Garside's affidavit, dealing with this matter, is vague, and supplies no evidence that a single pound of canned meat in these tins had ever been sent before the war to Denmark or to Germany. This was pointed out to Sir Robert Finlay during the argument, and, in consequence, the promise (already mentioned) to supply a statement as to this was made.

Although the claim, which had formally been put forward upon

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the affidavits, was that the goods shipped by Armour & Co. were sent in the ordinary course of the Danish or Scandinavian business, it is significant that at the hearing the ground adopted by Sir Robert Finlay was not the same. I will not paraphrase his statement of this ground, but will give his exact words :

"My case is not that they were all to be consumed in Denmark or Norway; my case is that they were not consigned to the German forces, and it was almost certain there was no continuous voyage."

Upon this the Solicitor-General intervened and said :

"I think I heard my learned friend say a moment ago that his case was not that these goods were destined for Danish consumption but for German civilian consumption."

Then Sir Robert Finlay answered :

"No; I said that our case was not that the goods were intended for consumption in Denmark, but that the persons to whom they were consigned sold them to Germany."

But as will be seen from the figures already given of the goods shipped by Armour & Co., less than one-fifth were said to have been sold to consignees; and the undisputed fact is that more than four-fifths had not been sold; and these are in fact claimed by Armour & Co. as having remained their property.

There are several references to Armour & Co. in the Ascher correspondence, but one passage refers to them alone and specially, and some explanation of it might have been expected. It relates to another vessel; but it illustrates the nature of Armour's business with countries contiguous to Germany in November, 1914.

On November 11 E. Ascher writes to Cudahy & Co. :

"Mr. Boerenbrink had a conversation with the representative of Armour & Co., in Rotterdam, who assured him that his principals had booked several parcels of stuff intended for German buyers on the steamship *Maartensdyk* without being compelled to sign a declaration; and if this is according to fact, we cannot explain why Messrs. Armour & Co. should be in a position to accomplish what you cannot."

More facts relating to the shipments of Armour & Co. will be stated when I deal with the claims of their alleged vendees,

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namely, the Provision Import Company, Christensen and Thoegersen, Brödr Levy, Hansen, and Frigast; and the present statements as to their direct claim must be supplemented by any material facts emerging from the consideration of the sub-claims.

Finally, I note that the claimants did not produce any letter, telegram, contract, or any other document passing between them and their agents in Copenhagen touching any part of the enormous quantities of goods shipped; and not one single book of account, or commercial document of any kind kept by their agents in Copenhagen, dealing with the goods claimed, was disclosed.

As to the Claim of Swift & Co. and Hammond & Co.

These two firms are connected, and their claims were taken as one. Together, the goods they shipped amounted to over $3\frac{1}{4}$ million lbs.; Swift & Co. consigning over two million, and Hammond & Co. over one million lbs. In all cases the consignments were to their own order. No part of Swift's two million lbs. had been sold, or contracted to be sold, to any one at the time of seizure. (It had been alleged and sworn by Mr. Edward Swift that a portion had been sold to one Dreyer of Aarhuus; but at the hearing this was not relied on.) But it was alleged that a considerable part of Hammond's goods had been sold to two firms, Buch & Co. and Bunchs Fed., whose sub-claims will be dealt with hereafter.

The affidavit in support of the claim was in the same common and perfunctory form as those in the last two cases.

The unnamed "salaried employee" and "agent," and the standing "instructions" to the agent to confine his sales to his district (in this case "Denmark"); the consignment "for sale in Denmark," and "only to firms established in Denmark," have become stereotyped. At the hearing it transpired that the person to whom the two companies entrusted the transaction of the business was one Peterman, their manager at Hamburg. After the war began an intercepted cablegram showed that on September 1, 1914, Swift instructed their agents at Rotterdam to ask their Hamburg office if it recommended consignments of meats

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and lards to a bank at Copenhagen, and if so what quantities, and who would sell, and what percentage of invoice value they could draw. The Court was not informed what answer was given by Peterman. At an early date, September 16, 1914, Peterman advised the companies to discontinue consigning their products, nevertheless later it is found that they cabled to Peterman to make sure to arrange proper storage at Copenhagen for their consignments, in view of the possible large number of consignments by other parties.

Again Peterman is asked if he can insure against war risk by other than German companies; and if not, to give name and financial standing of German companies, and to get assurance that losses would be promptly paid without complications. Before the war, a person of the name of Stilling Andersen of Copenhagen seems to have been entrusted with whatever business the claimants had in Denmark. After the seizure of the first three vessels, and after the sailing of the fourth, Swift & Co. write to Lane & Co. (who represented them in London) a letter (November 17) in which they say: "If it is necessary for you to obtain proofs of our ownership, will you kindly apply to Mr. H. Peterman, Copenhagen, at which point we have opened an office, in order to facilitate the handling of our business in Denmark, under the existing disadvantageous conditions. For your guidance, it might be well for us to mention that our business in Denmark for many years past has been carried on under the jurisdiction of our Hamburg office, Mr. Peterman there having charge of same."

Neither Mr. Peterman, nor any one acting for Swift & Co. or Hammond & Co., in Copenhagen, nor any one from their Copenhagen bankers made any affidavit, or gave any evidence relating to the business in which the large shipments in question were made.

The situation was described by counsel for Swift & Co. as follows:

"It comes to this, Stilling Andersen was the agent in Copenhagen. He was under the control of Peterman in Hamburg. The business that was done in Denmark was handled from Hamburg, Stilling Andersen being the local agent. Then when

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Peterman came across to Copenhagen Peterman would be the person still in control, although I daresay Stilling Andersen would still be the agent, though probably under the control of Peterman."

Later on (but before December 10) Peterman's name was entirely dropped out; and in the cablegrams relating to the business the name of "Davis" was used for Peterman. No evidence was given to explain why this "alias" of Peterman was adopted and used; nor was any evidence produced to show how the "alias" had been communicated to the Copenhagen or Hamburg offices.

No book of account, or correspondence or document of any kind kept by Peterman or any other agent of the claimants at Copenhagen relating to the business, was disclosed.

Thus was the case of Swift & Co. and Hammond & Co. left.

As to the Claim of Sulzberger & Sons Company.

This company's direct claim relates to close on $1\frac{3}{4}$ million of lbs. Their goods were shipped on all the vessels. There is a sub-claim by Pay & Co. for over 800,000 lbs. The consignments, Sulzbergers claim, were all to their own order—Leopold Gyth, of Copenhagen, being the party to be notified. It was said that Gyth was since August 1, 1914, the agent of the company for the sale of its products in Denmark. For some years before that Pay & Co. were the agents; and there was a controversy as to whether their agency had really ceased at the time of the seizure.

In a letter written by Pay & Co. to Sulzbergers on July 20, 1914 (about a fortnight before the war), they explain that the sales for the company had been retrograding owing to the manufacture of vegetable margarine having become predominant in Denmark, 80 per cent. of the produce being vegetable. In these circumstances it is strange that no evidence was forthcoming from Gyth, or any one else, to explain these large shipments.

It was put forward in the affidavit that the bills of lading had been dispatched through a bank to Copenhagen—I assume to a bank there—and that they had been returned. No corre-

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spondence was produced as to this; nor was there any evidence from any Copenhagen bank.

There is very little trace of anything which Gyth, the alleged agent, really did. I think there is only one cablegram to him at Copenhagen in 1914 amongst those intercepted. That was sent on October 16.

Other people connected formerly, and probably at the time, with Sulzbergers' Hamburg office were much more active. The earliest record of the Sulzberger transactions after the war began which was produced to the Court was a letter of September 21, written by Sulzbergers from Hamburg to Pay & Co. It is an important letter, showing what Sulzbergers' business projects at the time were, and to what devices they were willing to descend in order to get goods into Germany. It is best to set it out verbatim:—

"Hamburg, September 21, 1914.

"Messrs. Pay & Co., Copenhagen.

"Dear Sirs,

"We acknowledge receipt of your esteemed favour of 17th instant, contents of which duly noted.

"It is possible for us to buy great quantities of oleo and lard, &c., from America c.i.f. Stettin.

"We beg to ask you whether it is possible to send the goods from America, via Copenhagen to Stettin, if the bill of lading bears the following inscription, 'Party to be notified, Order Pay & Co.,' so that you stand quasi as consignee. You had then to transmit the goods for us to Stettin, for which we are willing to pay you a small allowance. We await your kind news as to this point.

"Concerning Mr. Leopold Gyth is at present nothing to be done with this gentleman, which is not astonishing under the critical circumstances prevailing.

"Very truly yours,

"Sulzberger & Sons Co."

Here are the claimants, through their Hamburg office, scheming to do what the Crown contend they intended to do in relation to the goods seized. Pay & Co. declined to comply. Whether Pay & Co., or Gyth, afterwards did what they were

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asked to do is another matter. But Gyth is afterwards named in all the bills of lading as the party to be notified. No explanation of this circumstance was vouchsafed.

Two German representatives of Sulzbergers, namely, Christiensen and Saemann, are afterwards at a Copenhagen hotel and are active over the cables. One of them shows that Christiensen, and not Gyth, was dealing with the war risk of the *Fridland*. Saemann in another (his twentieth) cable suggests the discontinuance of selling until cargoes seized should be released; and again he cables that he could ship to Sweden, "but that guarantee was required," which of course meant guarantee against exportation.

In connection with this it may be noted that Saemann cabled, again from Copenhagen, in January, that exportation of lard, casings, and fat backs from Norway had been prohibited; and Pay & Co. also cabled to them "Don't ship any lard Copenhagen" (after exportation from Denmark had been prohibited); in what capacity, whether as agents or not, was not explained.

It is interesting to note that Sulzbergers of Liverpool, in reference to these prize proceedings, ask the claimants over the cable, "Will it be convenient call witnesses from port destination show goods not intended enemy use?"

Whether there was an answer to that question I do not know, but the practical answer at the hearing was that it could not have been deemed convenient, as no witness from Copenhagen gave evidence either verbally or by affidavit.

In November, a cablegram shows that Sulzbergers had also supplied, or offered to supply, their corned beef to the French Government.

This they had a perfect right to do, subject to any risk of capture by enemy ships. It would be strange if they had been unwilling to do the same for Germany. The risk of capture of goods sent to France was very small compared with the risk of goods consigned to Germany. Dealings with the French Government could accordingly be had direct with practical safety. If there were to be transactions with the German Government, a much more indirect and involved plan may well have been deemed expedient.

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No particulars were given of any business carried on by the claimants at Copenhagen before the war. As in other cases, no books of account or any documents from the Europe end were disclosed; nor indeed any documents except the bills of lading and insurances.

No evidence was given by Sulzbergers touching the goods alleged to have been sold to Pay & Co.

Further facts relating to the claimants will be given in dealing with the claim of Pay & Co.

As to the Claim of Cudahy & Co.

The direct claim of this company is in respect of 176,559 lbs. of lard and beef casings shipped on the *Alfred Nobel* and the *Fridland*, to their own order—party to be notified Schaub & Co. The shipments were before the Order in Council of October 29.

The grounds of their claim are that they had sold the goods to Schaub & Co., for the Danish business of their firm at Esbjerg; that they had drawn upon them for the price, but that the drafts were not accepted by reason of the seizure; and that the goods remained the property of the claimants.

The claimants were dealing with the French Government (see Exhibit J.P.M. 2, pp. 1 and 8); and they were in close communication with E. Ascher & Co. of Hamburg, with reference to their trade with Germany, as the Ascher correspondence (J.P.M. 10) so clearly shows.

The claimants were quite open to carry on a trade in contraband with the enemy, as the facts clearly show; but the question as to the goods they now claim is whether they steered clear of dangers by a bona fide sale to Schaub & Co. of Copenhagen for use in Denmark. It was said that as to the lard (which was the chief consignment) it was to go through a refining process at Esbjerg. Whether afterwards the refined lard would have been sent to Germany is immaterial upon the question now before the Court, if it was at the time of seizure on its way to Denmark to a purchaser who intended to put it through a manufacturing process there.

The documents in this case were put fairly before the Court; and—although there are circumstances of suspicion—the

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conclusion to which I have come is that there were bona fide contracts of sale of the particular goods claimed by Cudahy & Co. to Schaub & Co. of Copenhagen, and that these goods were on their way to Denmark as their real and bona fide destination, and were intended to be imported on their arrival into the common stock of the country. The larger proportion of Cudahy's shipments is the subject of claims by Christensen and Thoegersen, and Elwarth, which will be dealt with in their appropriate places.

I have now stated the separate facts affecting the cases of the American shippers, and before proceeding to the cases of the alleged Scandinavian purchasers, I will refer shortly to what I have called the "Ascher" correspondence, which will be found in Exhibit J.P.M. 10 to the affidavit of the Procurator-General. This was a series of intercepted letters written from Hamburg by Ascher & Co. to the last-named claimants—Cudahy & Co.—some before the seizures, and others afterwards.

I read them for general information as to the circumstances in which it was known the trade in conditional contraband was carried on; and I find in them cogent corroboration of many facts and inferences already I think sufficiently established without them.

They sound almost like a talk between merchants "on 'Change" relating to a trade rendered interesting through the commercial risks which its manipulation involved. If the correspondence could have been completed by the inclusion of the letters from America in reply, it would have been still more elucidating.

The letters show an intimate knowledge of what was being done by the various shippers in reference to consignments of foodstuffs to Copenhagen; of the difficulty of exportation from Denmark to Germany; and of the probable fate of some of the cargoes now before the Court.

It was objected that they could not be evidence against any persons other than Ascher & Co. and Cudahy & Co., and that they ought not to be read in any of the other cases. If they stood alone, I should not act upon them as affecting those cases. But it must be remembered that Prize Courts are not governed or limited by the strict rules of evidence which bind, and some-

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times unduly fetter, our municipal courts. Such strict evidence would often be very difficult to obtain, and to require it in many cases would be to defeat the legitimate rights of belligerents.

Prize Courts have always deemed it right to recognize well-known facts which have come to light in other cases, or as matters of public reputation.

In the case of *The Rosalie and Betty* (1) Lord Stowell discussed the subject generally, and said: "In considering this case I am told that I am to set off without any prejudice against the parties, from anything that may have appeared in former cases; that I am not to consider former cases, but to consider every case a true one, until the fraud is actually apparent. This is undoubtedly the duty in a general sense of all who are in a judicial situation; but at the same time they are not to shut their eyes to what is generally passing in the world." Then he refers to well-known facts and expedients relating to illegal trading and fraudulent practices during war, and adds: "Not to know these facts as matters of frequent and not unfamiliar occurrence would be not to know the general nature of the subject upon which the Court is to decide; not to consider them at all would not be to do justice."

I will pause only to give one illustration from the American authorities. In the judgment in *The Stephen Hart* (2) the Court read from a statement by the Solicitor-General (Sir Roundell Palmer) in the House of Commons relating to the contraband trade between England and America by way of Nassau in the following passage:—

"The then Solicitor-General of England (Sir Roundell Palmer) stated in the House of Commons on June 29 last, referring to the cases of *The Dolphin* and *The Pearl*, decided by the District Court for Florida . . . . that it was well known to everybody that there was a large contraband trade between England and America by way of Nassau; that it was absurd to pretend to shut their eyes to it; and that the trade with Nassau and Matamoras had become what it was in consequence of the war"; and the learned judge in the same case in another passage said: "The cases of *The Stephen Hart, The Springbok, The Peterhoff*,

(1) (1800) 2 C. Rob. 343. (2) (1863) Blatch. Pr. Cas. 387, at pp. 403, 404.

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and *The Gertrude* illustrate a course of trade which has sprung up during the present war, and of which this Court will take judicial cognizance, as it appears from its own records and those of other Courts of the United States, as well as from public reputation."

The "Ascher" letters having been written to one of the big shippers about, and with intimate knowledge of, this trading and being obviously genuine, and indeed never intended to see the light in this Court, I consider that on general principles the Court was entitled to read them and so to inform itself as to this trade generally, without, of course, allowing any statements in them to injuriously affect any claimant, especially if there was no opportunity for him to deal with them. It is right to add, that if I had not been made acquainted with their contents, my decision in every case would have been the same; but they do give a sense of mental satisfaction in regard to inferences which have been drawn.

I will now proceed with the cases of the alleged purchaser claimants.

AS TO THE CLAIM OF PAY & CO.

This firm claims goods to the extent of 1,710,818 lbs., shipped on the four vessels.

The shippers were Sulzberger & Sons Company, Morris & Co., and the South Cotton Oil Company.

The consignments were to the order of the shippers, and in the case of Sulzberger & Co., the parties to be notified were Pay & Co.; in the case of Morris & Co., the parties to be notified were Morris & Co. of Christiania; and in the case of the South Cotton Oil Company no parties to be notified were named.

The substantial question in this case is whether Pay & Co. were merely agents of the consignors, or independent purchasers.

Pay & Co. say they were for many years before the war, and remained after the war, agents for Sulzbergers.

There is a conflict between their statement and that of Sulzbergers as to the agency. The latter say the agency of Pay & Co. ceased after August 1, 1914. No contracts for the purchase of the goods claimed by Pay & Co. were produced; but certain

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invoices were sent by them to the Procurator-General; and they allege that they paid for the goods. Except as to a small portion of the goods shipped by Sulzbergers on the *B. Bjornson*, and of the goods shipped by the Southern Cotton Oil Company on the *Fridland* (of the alleged sub-sales of which no particulars or satisfactory evidence were given), the goods they claim were not sold before the seizure, but were, according to their account, bought for the purpose of adding to their stock to be sold and consumed in Scandinavian countries.

In the affidavits filed on behalf of the claimants it was deposed that the "drafts for all the goods were duly paid" by them.

None of the drafts were produced.

At the hearing certain letters from the bankers were produced in order to establish that payments had been made.

These documents referred to some arrangements made after the seizure. They do not show what, if any, sums were paid, but refer to certain arrangements to debit, which were only book entries. I saw none of the books.

No evidence has been adduced from the bankers themselves, nor was any explanation given of the communications from Pay & Co. which led to the bankers writing the letters referred to.

It ought to have been easy for the claimants to show by documents when and how, and at what price and on what terms, they purchased the goods, if they really were purchasers on their own account, and to prove, if that was the fact, that payment was made as alleged.

The claimants aver that when the war broke out they received letters from the American slaughtering firms asking them to assist the American houses in sending goods to German buyers, but that they refused to entertain the proposition.

They do not say whether the request came from the shippers of any of the goods they now claim. They ought to have done so. The not unnatural inference is that it did.

No evidence whatever has been given by any of the consignors in regard to the goods claimed by Pay & Co.

After a careful consideration of all the circumstances, I have come to the conclusion that the claimants have not shown that

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the goods were sent to them as purchasers, but that they were sent to them as agents for the consignors. Even if they had intended to purchase the goods for themselves, they have entirely failed to satisfy me that they had become the owners of the goods.

AS TO THE CLAIM OF THE PROVISION IMPORT COMPANY.

This is a Danish company carrying on business in Copenhagen as importers and dealers in lard stock, &c.

Their direct claim is to 1,176,050 lbs. of lard and oleo stock shipped on the *A. Nobel* and the *Fridland*. The shippers were Armour & Co.—the consignees Armour & Co. of Copenhagen —and the parties to be notified were the Provision Import Company.

The case for the claimants is that they bought and paid for the goods from the shippers through their agents at Copenhagen in the ordinary course of business, and that the goods were intended to and would have been disposed of in their business in Scandinavia if they had been delivered. They give particulars of sub-sales in Denmark and Sweden to margarine manufacturers before the seizure. These sub-sales comprise over 200,000 lbs. of the goods—the other portion, over 900,000 lbs., they say had not been sold at the time of seizure.

The Crown's case was that the sales were not real sales, but that the Provision Import Company were merely to deal with these goods as agents for the shippers.

There is evidence that before the war they bought goods from Armours; there is no evidence that they were ever agents for them. In the affidavit of the Procurator-General the Provision Import Company were said to be the representatives of Hammond & Co. in Copenhagen; but they are not in these cases involved in any of the Hammond shipment transactions. I only find them once mentioned in the intercepted Armour cablegrams. That is on October 29, a date subsequent to those given for the purchases of the goods in question, but anterior to any seizures. That cablegram is consistent, and I think only consistent, with their being the purchasers in the case it refers to.

The documents were fairly completely produced to the Court

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by the claimants. In my opinion the right conclusion is that the Provision Import Company were bona fide purchasers of the goods they claim.

AS TO THE CLAIM OF CHRISTENSEN AND THOEGERSEN.

This claim is in respect of goods shipped by Morris & Co. on the *A. Nobel* and the *B. Bjornson*; by Cudahy & Co. on the *A. Nobel* and the *Fridland*; and by Armour & Co. on the *Fridland*. The shipments were all, therefore, before the Order in Council of October 29, 1914.

The main question as to these goods is whether they were sent to the claimants as selling agents for the shippers, or as purchasers on their own account.

The affidavits of Mr. Thoegersen, the sole proprietor of the firm, acknowledge that they sometimes acted as agents, but say that these particular goods were sold to, and bought by, them as purchasers, and that as to the greater part of the goods, the claimants had sold them to their own customers in Denmark, Sweden, and Norway, some before the sea voyage commenced, and others during transit. Particulars of these sub-sales were given.

The Ascher correspondence throws some light on the situation as between Christensen and Thoegersen and Cudahy & Co.

I am now going to refer to the Ascher correspondence as being helpful to some of the claimants.

In a letter dated November 25, 1914, Ascher writes: "We are glad you have been able to do so heavy a business with Messrs. Christensen and Thoegersen, and of a portion of it they have already reaped the benefit, for we have been informed that heavy lines of lard of your brand have been already distributed amongst German buyers, particularly in the east by way of Stettin. How they will fare with subsequent shipments is problematical, for the fate of the s.s. *A. Nobel* is still quite uncertain."

And in a later letter (January 6 last): "As for Christensen and Thoegersen they are said to have made so much money out of the war, that even a big loss would not be greatly felt by them, if the *Nobel* should be permanently lost. This, however, we think is out of the question so far as neutral owners of the cargo are concerned."

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I cannot doubt that Christensen and Thoegersen did sell large quantities to Germany of goods imported from the American meat packers.

It is sworn that the drafts which appear by the documents to have been drawn by the shippers on the claimants were duly paid. I should have desired better evidence upon this point; but the dispute really is not whether the title to the ownership of the goods had passed, but whether in these particular transactions the claimants were acting merely as agents, or intermediaries for the consignors, or were purchasers. The passages I have read from the Ascher letters are more consistent with their being purchasers; and upon the whole the conclusion to which I have come is that the goods claimed were shipped to them as bona fide purchasers, and not as agents.

As to the Claim of Brödr Levy.

This firm of merchants ("dealers in herrings, codfish, and provisions") claims lard and fat backs, shipped by Morris & Co. to their own order respectively.

The proofs in this case are not satisfactory. The goods comprised in bill of lading 11 on the *Kim* are also claimed by Morris & Co.; and those in bill of lading 62 on the *Kim* are also claimed by Armour & Co. The goods claimed from the *A. Nobel* are said to have been bought from Conrad Bang, an agent for Morris & Co. at Copenhagen, and from Backstrom, their agent at Stockholm.

An alleged copy of invoice, dated October 26, 1914, was exhibited, which says the goods were intended for the *A. Nobel* (which had sailed six days before), and that they had been war-insured at Copenhagen. In relation to all the goods claimed there is a bare statement that payment was made without any dates, amounts, or particulars whatsoever. The claimants did not produce any of the shipping documents. No affidavits were made by Bang or Backstrom or by any one from Armour's Copenhagen office. The claimants do not say whether they had dealt in lard or fat backs before or not. No dates appear on the invoices. The shippers who are said to have been paid also lay claim to close on half of the goods. Altogether the proofs are

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deficient, and I am not satisfied that the goods claimed were sold to the claimants, or that they had paid for the goods, or become the owners thereof; and the claim fails.

As to the goods also comprised in the claims of Morris & Co. and Armour & Co., they must be treated, therefore, as having been shipped by the shippers to their own order, and remaining their property at the time of seizure.

AS TO THE CLAIMS OF VILHELM ELWARTH.

Mr. Elwarth has put forward two claims: (1.) one dated April 10, 1915, to 61,000 lbs. of lard shipped by Cudahy & Co. on the *A. Nobel*—to their own order—party to be notified, Ernst Ascher & Co. of Rotterdam; and (2.) the other dated June 1, 1915, to 88,618 lbs. of oleo oil, shipped on the same vessel by the Consolidated Rendering Company, of Brightwood, Massachusetts—to their own order—with the same party to be notified.

It is necessary to investigate closely the position of Vilhelm Elwarth. He was described in the affidavit of the Procurator-General as the agent in Copenhagen of E. Ascher & Co. of Hamburg. In his affidavit in reply he does not deny that, although he denies agency qua the particular transaction. In his affidavit of May 15, in support of the first claim, he said he carried on business in Copenhagen as a provision merchant with a large number of retail dealers as customers. In that of June 14, in support of the second claim, he has become an import merchant frequently importing into Denmark, among other things, oleo oil. His case is that he bought both the lard and the oleo oil at different times from Ernst Ascher & Co. of Rotterdam. The latter are agents for E. Ascher & Co. of Hamburg. He alleges that he bought the lard verbally on September 26 on a personal visit of some one to him at Copenhagen; that payment was to be by draft against documents; and that "in due course" he paid for the said goods and took up the documents. The draft was not produced and no dates or further particulars of payment are given. The oleo oil he says he bought verbally at Rotterdam on July 25 and 28, 1914; and that payment was to be by net cash. The documents purporting

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to be invoices for all the goods bear date November 3. No explanation was given of how the claim to the goods comprised in the earlier contract was not made till a couple of months after the claim to the goods the subject-matter of the later contract.

The Ascher letters, written by his principals, throw light upon the lard transaction, and upon the rest of Elwarth's claim. It will be remembered that evidence was given, and not contradicted, that he was Ascher's agent at Copenhagen. In a letter to Cudahy of November 7, Ascher & Co., of Hamburg, appear to treat the lard as having been their property. They say, "Nor are we sure that the war-risk on the 500 half-barrels of pure lard on board the steamship *Alfred Nobel* had been taken out by your good selves, not having received a debit note of the charge up to the present." Later, in the same letter, they say that it had been sold by their Rotterdam office "to a Danish firm." These were the consignments of lard claimed by Elwarth.

Elwarth is not named, although he was well known; and it is doubtful whether he was the person referred to, as he does not appear to be a member of any "firm."

After the capture of the *A. Nobel* they write (November 20) that they were interested both in the lard and oleo oil: "We are watching the development with much interest, although we ourselves are interested only with those 500 half-barrels of lard of yours, and a couple of hundred tierces of oleo, both of which we are happy to say are fully covered against war risk, so that in the worst of cases we cannot lose much." Those were all the goods claimed by Elwarth. They had in the meantime also suggested that consignments to them should be made ostensibly to Elwarth. They wrote: "We suppose if Rotterdam were to cable you 'Ship sales Elwarth,' you would understand that this meant a request to have our purchases forwarded to Copenhagen either to the address of our agent at that city, Mr. Vilhelm Elwarth, or to your order, party to be notified, Vilhelm Elwarth, Copenhagen. It might be right also in that case for you to invoice the goods to Mr. Elwarth, handing on a copy of the invoice simultaneously."

The correspondence refers frequently to Elwarth, and it

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contains a testimonial to his assiduity and fidelity as an instrument of Ascher & Co., Hamburg, since the beginning of the war in these words:

"We repeat that we consider ourselves responsible for any shipments you may be making to Mr. Elwarth during this period, and we are glad to say he has proved himself entirely reliable in all transactions which we had to let go through his hands since the beginning of the war."

I have come to the conclusion that the claim made by Elwarth is not a bona fide claim on his own behalf. He was not a purchaser from Ascher & Co. of Rotterdam, or of Hamburg He was merely a nominee of theirs. The goods are not claimed by any person entitled to them, and therefore they stand to be treated as goods unclaimed.

As to the Claim of Peter Buch & Co.

A claim was put in on behalf of this firm to goods covered by bills of lading on three of the vessels, as follows:

On the *B. Bjornson*, BB/L. 178 to 186, and 188;

On the *Fridland*, BB/L. 62 to 65, and 78; and

On the *Kim*, BB/L. 95 to 97, and 128—131.

The total quantity of the goods thus claimed was 752,908 lbs. They were all shipped by Hammond & Co. to their own order.

Although the claim was entered, no evidence whatsoever was adduced, nor was any document produced in support of it. Counsel appeared for some underwriters in the names of Buch & Co., but had not been supplied with any documents or materials. (It should be noted that when Mr. Cave referred to an affidavit relating to goods on the *Fridland* (B/L. 61) as if it was one by the present claimants, there is a confusion: that affidavit related to another claim by C. Bunchs, Fedevare-forretning.)

The evidence for the Crown was that Peter Buch & Co., of Copenhagen, were very large exporters of provisions to Germany, and were a branch of the firm of that name in Hamburg. The shippers gave no evidence as to these shipments.

As no evidence was adduced in support of the claim, it necessarily fails.

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AS TO THE CLAIM OF J. O. HANSEN.

The subject-matter of this claim is a quantity of lard and fat backs amounting to 400,625 lbs. Mr. Hansen says he is a Danish dealer in such goods.

He claims four parcels of goods—one parcel each on the *B. Bjornson*, *Fridland*, and *Kim*, consigned by Morris & Co. to their own order; and another parcel on the *Kim* consigned by Armour & Co. to their own order.

The goods shipped by Morris he alleges he bought from Erik Valeur; those by Armours from their Copenhagen office. He adds a schedule purporting to give a list of his alleged purchases and resales; but he did not produce a single document relating to any of the transactions; no contract, invoice, bill of lading, draft, receipt, account, or anything else. No explanation or excuse was made for this. Erik Valeur was the representative in Copenhagen of Morris & Co. He made an affidavit in support of his own claim, to which reference may be made by way of criticism of this claim. He alleged that he bought some goods for Morris on his own account, and sold others as agent. How he came to decide which was which he did not explain. The goods claimed by Hansen on the *B. Bjornson*, Valeur says, he bought on his own account. The sale to Hansen, he says, was on September 30—although Valeur himself says he only bought on October 6.

Hansen has entirely failed to show that he was the purchaser or owner of any of the goods. His claim is quite unsupported, and I cannot accept it.

AS TO THE CLAIM OF SEGELCKE & CO.

Mr. Eilert Segelcke, the sole proprietor of this firm of wholesale dealers in lard and bacon in Copenhagen, claims 275,297 lbs. of lard and fat backs shipped by Morris & Co. on the *B. Bjornson* and the *Kim* to their own order. The claimants say they bought the goods partly through Valeur, and partly through Conrad Bang (agents for Morris & Co.).

According to the affidavit of Eilert Segelcke sworn May 18, 1915, the various goods were paid for at different times.

I am prepared to accept the account given by Segelcke as

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accurate. Accordingly I find that his firm were bona fide purchasers of the goods they claim.

AS TO THE CLAIM OF PEDERSEN FOR THE FAELLESFORENINGEN FOR DENMARKS BRUGSFORENINGER.

This is a claim to 45,219 lbs. of neutral lard shipped on the *B. Bjornson* by Morris & Co. to their own order.

The goods are also claimed by Morris & Co. themselves.

In the affidavit of Pedersen of March 19 it is deposed that the goods were bought for the purpose of keeping up the stock so that the firm could comply with orders for margarine "from the members."

No document is produced. The deponent does not even state from whom the goods were bought, or what the date of the alleged purchase was; and he does not allege that any payment was made. In a subsequent formal claim (April 9, 1915) the grounds of claim state that the goods were bought from Erik Valeur, who in the first instance had himself bought the goods at an agreed price, c.i.f. Copenhagen, and had taken up the documents and paid for the goods. On looking at Valeur's own account in his affidavit the statement is, not that he had bought or paid for the goods, but that he sold them to Pedersen's firm as agent for Morris & Co.

In these circumstances the claimant's proof is quite unsatisfactory; and accordingly, particularly as Morris & Co. themselves also claim the goods, I decide that Pedersen's firm have failed to establish their claim. So far as they are comprised in the claim of Morris & Co. they fall to be treated as goods which remain unsold.

AS TO THE CLAIM OF HENRIQUES AND ZOYDNER.

This firm claims 81,096 lbs. of lard shipped on the *B. Bjornson* by Morris & Co. to their own order. The affidavit in support of the claim contains the bare statement that this lot was purchased for the purpose of keeping up the firm's stock. There is no statement as to the persons from whom the purchase was made, what its terms were, what the purchase price was, or that the price, whatever it was, was ever paid. In a subsequent formal

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claim (unsworn) the grounds of claim state that the goods were purchased from Mr. Erik Valeur; that Valeur had in the first instance purchased the goods at an agreed price, c.i.f. Copenhagen, and that the documents therefor had been previously taken up and paid for by him. This statement is in direct contradiction to that of Valeur himself (in the affidavit already referred to), where he says he sold these goods merely as agent for Morris & Co.

My conclusion is that the claim of this firm has not been established.

AS TO THE CLAIM OF FRIGAST.

This is a claim to 15,750 lbs. of lard shipped by Armour & Co. on the *B. Bjornson*, and consigned to their own order. Mr. Frigast is a provision merchant at Copenhagen, and claims the goods under purchase through Armour & Co., of Copenhagen, on November 19 for the purpose of his business. He produced satisfactory documents, and I accept his account of the transaction as a real and bona fide transaction of purchase, and find that he had become the owner of the goods, and that he purchased them to be used in his own business.

AS TO THE CLAIM OF THE KORSOR MARGARIN FABRIK. A/S.

This firm claims one lot of thirty tierces of oleo stock laden on the *Fridland*, and another lot of thirty tierces of oleo oil laden on the *Kim*. The shippers were Morris & Co. to their own order at Christiania. They themselves also claim the first lot. The claimants say the goods were first bought by Erik Valeur, at an agreed price c.i.f. Copenhagen, and that they in turn bought from Valeur. They do not say when they bought, what the price was, or that any payment has been made. Valeur himself does not say he purchased the goods and resold them, but that he sold as agent for Morris & Co. A declaration of the claimants of March 19, 1915, that the goods would be consumed in Denmark states that they were purchased from Morris & Co. through Erik Valeur. The evidence in support of the claim is quite unsatisfactory, and I find the claim has not been established. The result is that the goods on the *Fridland* which are also claimed

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by Morris & Co. must be treated as goods of Morris & Co. unsold; and the goods on the *Kim* as goods unclaimed by any person entitled as owner.

AS TO THE CLAIM OF THE MARGARINEFABRIK DANIA.

This is a small claim to 9004 lbs. of lard on the *Fridland*, shipped by Morris & Co. and consigned to their own order at Christiania. The goods are also claimed by Morris & Co. themselves.

The case is to all intents identical with the Korsor claim just dealt with, except that in this case Valeur states he bought them first on his own account and sold them on the same day. They were invoiced after the seizure.

I find that the claim has not been established.

THE CLAIM OF C. BUNCHS FED.

The claimants are a Danish company. The claim is to a parcel of beef tongues (3371 lbs.), shipped on the *Fridland* by Hammond & Co., consigned to their own order, naming Christensen and Thoegersen as the "parties to be notified."

The company say they bought the goods from Christensen and Thoegersen. They produced the bill of lading and priced invoice from Christensen and Thoegersen, and it is sworn they took up the documents. The invoice was sent two days after the seizure. Whether when it was sent the seizure was known does not appear.

On the whole I have come to the conclusion that this is a bona fide claim to goods bought to be dealt with in Denmark; and the claim is therefore allowed.

AS TO THE CLAIM OF ERIK VALEUR.

This is a claim to 106,155 lbs. of oleo stock laden on the *Kim*.

The shipment was by Morris & Co. to their own order at Copenhagen—the parties to be notified being the Morris Packing Company of Christiania.

Mr. Valeur was the representative of Morris & Co. at Copenhagen. He said his agency comprehended Denmark only. He

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alleges that certain of the consignments by Morris (many of which have already been referred to) were sent to him for sale as agent, in Denmark; and that if he wished to sell goods to Germany, or German buyers, he would have to buy them for his own account. The goods he now claims he says he bought on his own account, and I suppose they were therefore goods he intended to send to Germany. I am not satisfied that they were. They were said to have been invoiced to him some days after the capture of the last of the first three vessels.

I find that he has no ground whatever for his allegation that he was the owner of the goods.

THE CLAIM OF CHRISTIAN LOEHR.

This claim is for 41,952 lbs. of lard alleged to have been bought from the Provision Import Company. This parcel was shipped on the *Alfred Nobel* and consigned by Rumsay & Co. to their own order, the Provision Import Company being the parties to be notified. In dealing with the direct claim of the latter I mentioned that certain goods shipped for them had been resold.

Mr. Loehr is a Dane, and is the British Vice-Consul in Denmark. He produced his documents, and I see no reason to doubt the bona fides or the reality of his purchase as one made for the purposes of his business in Denmark.

AS TO THE CLAIM OF J. ULLMAN & CO.

The subject-matter of this claim consists of certain rubber of various kinds. 347 cases (133,209 lbs.) were shipped on the *Fridland*, and 218 cases (44,428 lbs.) on the *Kim*. The consignors were Edward Maurer & Co., and the consignees "J. Ullman & Co., Copenhagen."

Rubber was declared conditional contraband on September 21, and absolute contraband on October 29, 1914.

At the time of the shipment on the *Fridland*, therefore, rubber was conditional contraband, and at that on the *Kim* it was absolute.

Exportation of rubber of this kind from Denmark was

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prohibited on October 22, before either of the shipments. Jacques Ullman had up to the time of the war carried on business as a merchant in rubber and other articles at Hamburg.

It was stated for the Crown that he was a German; but this was a mistake, as it was established that he was born a Swiss and had remained a Swiss subject. After the war he gave up his Hamburg business and began trading in Denmark. He, with his wife, formed a Danish company, "J. Ullman & Co.," on October 24, 1914.

The transactions relating to the goods claimed were attacked by the Crown on the ground that the rubber was falsely described in the ship's papers as "gum" with the object of misleading, and on the ground that the *Fridland* shipment was confiscable as conditional contraband because it was destined for the enemy country and for the use of the enemy Government; and the *Kim* shipment as absolute contraband on the ground of destination for the enemy country.

The goods were invoiced as rubber. Much evidence was given on both sides upon the question whether "gum" was an accurate or a false description of the goods. After weighing the evidence I have come to the conclusion that it was not an accurate commercial description, and that its use in the manifest instead of the appropriate commercial description of "rubber," or various qualities of rubber by their commercial names, was adopted in order to avoid the inconvenience or difficulties which would result from a search and possible capture.

Any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will, while I sit in this Court, weigh heavily against those adopting such courses when any presumptions or inferences have to be considered. Neutrals are expected to conduct their neutral trade during the war not only without having recourse to fraud, or false papers, but with candour and straightforwardness. As has been said by the American Supreme Court, "Belligerents are entitled to require of neutrals a frank and bona fide conduct." It will not be found against their interest to pursue such conduct; but in investigating attempts to

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mislead by misdescription or otherwise, care must be taken to ascertain who have taken part in such attempts, and to what extent.

In the present case I find upon the facts that the misdescription of the rubber as "gum" in the manifest was due in the main to Gans & Co.—the charterers of the vessels. Copies of the invoices with the correct description of rubber were given to Gans & Co. for the purpose of the manifest which was to be made out by them. Maurer & Co. no doubt acquiesced in this because otherwise they would probably have lost the benefit of the freight contract which they had made early in October; but I do not find that the claimants, the consignees, ever suggested or took any part in this. I do not find that they were aware of the description used until after the *Fridland* sailed. There was read against them a passage in a cablegram of October 31, "Expect you informed Bruno (the insurer) everything shipped as gum." The explanation of Ullman that this was because of a cablegram he received on October 28 is, I think, sufficient. Similarly I do not find that they were responsible for the misdescription of their cargo on the *Kim*.

I have examined the commercial documents, and considered very carefully the cablegrams set out in Exhibit J.P.M. 1 (many of which, however, do not affect the claimants), and the letters and cablegrams exhibited to Ullman's second affidavit—and even if they are approached in an attitude of suspicion created by some of the surrounding circumstances, I cannot arrive at the inference that the rubber was on its way to an enemy destination when it was seized; on the contrary, my conclusion from the evidence is that the sale to Ullman, and the purchase and payment by him, were honest business transactions, and that he intended to add the rubber to his stock in his Denmark business, and to dispose of it in Scandinavia in the very profitable market described in his letters, which was created greatly by the stoppage to Scandinavia of all exports of rubber from or through Germany.

A very full and strict undertaking was given on the part of Ullman & Co. in the course of these proceedings. That must be adhered to. I need not trouble further about other undertakings

given in the course of this case, except to say that they must be adhered to.

THE CLAIM OF W. T. BAIRD.

This relates to 39 cases (29,771 lbs.) of rubber shipped on the *Kim* on November 11 (about a fortnight after rubber was declared absolute contraband) by Baird, and consigned to Fritsch.

It stands upon a different footing from the last, as the claimant is the shipper. There are three people concerned: Baird, and Frankfurter, in America, and Fritsch at Landskrona in Sweden. Fritsch was the German Vice-Consul at Sweden, and a forwarding agent. Baird claims as the owner.

The transaction is not made as clear as it could and should have been. Counsel at the hearing stated it thus:

"Mr. Baird sold these 39 cases of rubber to Mr. Frankfurter, who was also a rubber broker in New York, and he in turn sold it to Mr. Fritsch."

The claimant, Baird, deposed that the contract for the sale of the said goods was made between Frankfurter and the Rubber Trading Company, of which Baird was president; and that, at the time of such sale, he was requested by Frankfurter to make the shipment to W. Fritsch, "who (he says) was the principal for whom Frankfurter was acting." Frankfurter exhibits an order which he received from Fritsch—pursuant to this order (according to his affidavit) he entered into a contract with Baird "for the purchase of the rubber." No contract or invoice has been produced; the only documents placed before the Court are the letter from Fritsch to Frankfurter, and a copy of the bill of lading. Two bills of lading were given—both of these were sent to Fritsch, according to Baird's statement. He does not say by whom they were sent. Whether Fritsch dealt with them, or what has become of them, the Court was not informed. Baird does not say that any right to dispose of the goods was reserved on the sale to Frankfurter, or to Fritsch, or when the two original bills of lading were sent. Frankfurter throws no light upon this; and Fritsch has not given any evidence or made any deposition.

I am not satisfied that Baird has made out his claim to be owner of the goods, or that any property remained in him after

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the shipment. There are, moreover, some other matters to which I must advert in connection with the claim. As to the description of the rubber as "gum," he gave no explanation in his affidavit; but he allowed it to be understood as having been done in the ordinary course of business, for all he says about it is, "I have been engaged in buying and selling rubber for forty years in the city of New York, and I have always understood the terms 'gum' and 'rubber' to be interchangeable terms in the trade, and have frequently known of rubber being described as 'gum.'"

In a letter of January 28 he wrote that he could not give any instance of crude rubber having been shipped under the name of "gum."

Later on the Rubber Club of New York, of which he was a member, appears to have asked Mr. Baird to give them an explanation of the transaction. His answer took the form of a statement made and certified before a notary public on March 24, 1915. There he said the contract was entered into on October 29, 1914, with Frankfurter, and the goods were sold to him. Fritsch of Landskrona is not mentioned. Frankfurter is said to have given assurance that the rubber was for Danish consumption. Fritsch was a merchant in Sweden, and that is not the assurance he is said to have given. As to the way in which the rubber was described, he said that the instruction to his shipping clerk to ship it as "gum" was given by Frankfurter, and that he had since been told by Frankfurter that the Gans Line suggested that denomination. Frankfurter does not deal with any of this in his affidavit made two months later. Baird was therefore a party to this misleading description.

Taking the whole circumstances into consideration, I am justified in drawing the inference that the rubber was on its way to enemy territory through Fritsch, the German Consul; and even if the claimant had made out his claim to be the owner, I find that the rubber was confiscable as absolute contraband.

As to the Claim of Marcus & Co.

This claim refers to 99 bales of hides (18,968 lbs.) shipped on the *Kim* on November 11.

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Hides were declared conditional contraband on September 21, 1914.

The consignors were Amsinck & Co., of New York; and the consignees Marcus & Co., of Copenhagen. The latter are hide merchants dealing largely with Hamburg. The claim alleges that the goods were purchased from Goldtree, Liebes & Co., of Santa Ana, El Salvador, on terms c.i.f. Copenhagen, cash to be paid on receipt of goods. It was also alleged that the goods had been paid for by the claimants. No proof of payment was given; and it would be strange if the goods were paid for before seizure, when payment was only due on receipt of the goods. Goldtree, Liebes & Co. were also merchants at Hamburg. The goods were insured by Hamburg offices. On reference to the exhibit set out in J.P.M. 11, it will be seen that the claimants were a firm having active dealings, after the war, with Hamburg.

Amsinck & Co., the consignors, were shown to have sent under cover to a bank in Christiania a lot of letters to be sent on to Germany, addressed to various people in Hamburg and Berlin, which were to have been reposted as if they had been sent from Christiania. Among such letters, which were intercepted, was one to Goldtree, Liebes & Co., of Hamburg, of June 5, 1915, relating to this very parcel of hides, in which they express the hope that the goods have arrived, and refer to Goldtree's "friends in Copenhagen," meaning, without doubt, Marcus & Co., the claimants.

No evidence was given as to what was done with the bill of lading.

As the goods were consigned c.i.f. to Copenhagen and were to be paid for on receipt of the goods, and as the goods were never received by the consignees, and no satisfactory evidence was given of the alleged payment, I am not satisfied that the goods ever were the property of the claimants as alleged. Besides, the proper inference from such evidence as was adduced is, in my opinion, that Marcus & Co. in Copenhagen were merely intermediaries between Goldtree, Liebes & Co. of Santa Ana, and Goldtree, Liebes & Co. of Hamburg, to whom the goods were really destined at the time of seizure.

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THE CLAIMS OF THE GUARANTY TRUST COMPANY OF NEW YORK.

These are the last claims I have to deal with. They relate to wheat and flour on the *A. Nobel*, the *B. Bjornson*, and the *Fridland*.

In the first, the Trust Company are associated with Newman & Co.; in the second, with Norris & Co.; and in the third, partly with Norris & Co.

The facts in these cases were not sufficiently placed before the Court; and there was no argument upon them on behalf of the Crown.

They must be further dealt with by the Crown and the claimants before the Court can dispose of them.

I must accordingly adjourn them for further argument.

The details of all the claims have now been set out. I am very sorry it has taken so long, but it must be remembered that I had to deal with, not one case, but, I think, twenty-five cases.

With regard to the general character of the cargoes, evidence was given by persons of experience that all the foodstuffs were suitable for the use of troops in the field; that some, e.g., the smoked meat or smoked bacon, were similar in kind, wrapping, and packing to what was supplied in large quantities to the British troops, and were not ordinarily supplied for civilian use; that others, e.g., canned or boiled beef in tins, were of the same brand and class as had been offered by Armour & Co. for the use of the British forces in the field; and that the packages sent by these ships could only have been made up for the use of troops in the field. As against this, there was evidence that goods of the same class had been ordinarily supplied to and for civilians.

As to the lard, proof was given that glycerine (which is in great demand for the manufacture of nitro-glycerine for high explosives) is readily obtainable from lard. Although this use is possible, there was no evidence before me that any lard had been so used in Germany; and I am of opinion that the lard comprised ought to be treated upon the footing of foodstuffs only. It is largely used in German army rations.

As to the fat backs (of which large quantities were shipped),

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there was also proof that they could be used for the production of glycerine. Mr. Perkin, in his affidavit in answer to that of Mr. George Stubbs, of the British Government Laboratory (which dealt with lard and fat backs as materials out of which glycerine was producible), confines his observations to lard; and passes by entirely what had been deposed as to fat backs. In fact no evidence as against that of Mr. Stubbs was offered for the shippers of fat backs. Mr. Nuttall, a deponent for one of them, Sulzberger & Sons Co., says the fat backs shipped by them were not in a condition which was suitable for eating; but he may have meant only that they required further treatment before they become edible.

There was no market for these fat backs in Denmark. The Procurator-General deposed as a result of inquiries that the Germans were very anxious to obtain fat backs merely for the glycerine they contain. In these circumstances it is not by any means clear that fat backs should be regarded merely as foodstuffs in these cases, and in the absence of evidence to the contrary, it is fair to treat them as materials which might either be required as food, or for the production of glycerine.

The convenience of Copenhagen for transporting goods to Germany need hardly be mentioned. It is in evidence that the chief trade between Copenhagen and Germany since the war was through Lübeck, Stettin, and Hamburg.

The sea-borne trade of Lübeck has increased very largely since the war. It was also sworn in evidence that Lübeck was a German naval base. Stettin is a garrison town, and is the headquarters of army corps. It has also shipbuilding yards where warships are constructed and repaired. It is Berlin's nearest seaport. It will be remembered that one of the big shipping companies asked a Danish firm to become nominal consignees for goods destined for Stettin. Hamburg and Altona had ceased to be the commercial ports dealing with commerce coming through the North Sea. They were headquarters of various regiments. Copenhagen is also a convenient port for communication with the German naval arsenal and fortress of Kiel and its canal, and for all places reached through the canal. These ports may properly be regarded, in my opinion, as bases of

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supply for the enemy, and the cargoes destined for these might on that short ground be condemned as prize; but I prefer, especially as no particular cargo can definitely be said to be going to a particular port, to deal with the cases upon broader grounds.

Before stating the inferences and conclusions of fact, it will be convenient to investigate and ascertain the legal principles which are to be applied according to international law, in view of the state of things as they were in the year 1914.

While the guiding principles of the law must be followed, it is a truism to say that international law, in order to be adequate, as well as just, must have regard to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it": vide *The Jonge Margaretha.* (1)

Two important doctrines familiar to international law come prominently forward for consideration: the one is embodied in the rule as to "continuous voyage," or continuous "transportation"; the other relates to the ultimate hostile destination of conditional and absolute contraband respectively.

The doctrine of "continuous voyage" was first applied by the English Prize Courts to unlawful trading. There is no reported case in our Courts where the doctrine is applied in terms to the carriage of contraband; but it was so applied and extended by the United States Courts against this country in the time of the American Civil War; and its application was acceded to by the British Government of the day; and was, moreover, acted upon by the International Commission which sat under the Treaty between this country and America, made at Washington on May 8, 1871, when the commission, composed of an Italian, an American, and a British delegate, unanimously disallowed the claims in *The Peterhoff* (2), which was the leading case upon the subject of continuous transportation in relation to contraband goods. (The other well known American cases—e.g., *The Stephen Hart* (3), *The Bermuda* (4), and *The Springbok* (5)—considered

(1) (1799) 1 C. Rob. 189; and Chancellor Kent's Commentaries, p. 139.
(2) (1866) 5 Wall. 28.
(3) Blatch. Pr. Cas. 387.
(4) (1865) 3 Wall. 514.
(5) (1866) 5 Wall. 1.

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and applied the doctrine in relation to attempted breaches of the blockade.)

I am not going through the history of it, but the doctrine was asserted by Lord Salisbury at the time of the South African war with reference to German vessels carrying goods to Delagoa Bay, and as he was dealing with Germany, he fortified himself by referring to the view of Bluntschli as the true view as follows: "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

It is essential to appreciate that the foundation of the law of contraband, and the reason for the doctrine of continuous voyage which has been grafted into it, is the right of a belligerent to prevent certain goods from reaching the country of the enemy for his military use.

Neutral traders, in their own interest, set limits to the exercise of this right as far as they can. These conflicting interests of neutrals and belligerents are the causes of the contests which havetaken place upon the subject of contraband and continuous voyages.

A compromise was attempted by the London Conference in the unratified Declaration of London. The doctrine of continuous voyage or continuous transportation was conceded to the full by the conference in the case of absolute contraband, and it was expressly declared that "it is immaterial whether the carriage of the goods is direct, or entails transhipment, or a subsequent transport by land."

As to conditional contraband, the attempted compromise was that the doctrine was excluded in the case of conditional contraband, except where the enemy country had no seaboard. As is usual in compromises, there seems to be an absence of logical reason for the exclusion. If it is right that a belligerent should be permitted to capture absolute contraband proceeding by various voyages or transport with an ultimate destination for the enemy territory, why should he not be allowed to capture goods which, though not absolutely contraband, become contraband by reason of a further destination to the enemy Government or its armed forces? And with the facilities of

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transportation by sea and by land which now exist the right of a belligerent to capture conditional contraband would be of a very shadowy value if a mere consignment to a neutral port were sufficient to protect the goods. It appears also to be obvious that in these days of easy transit, if the doctrine of continuous voyage or continuous transportation is to hold at all, it must cover not only voyages from port to port at sea, but also transport by land until the real, as distinguished from the merely ostensible, destination of the goods is reached.

In connection with this subject, note may be taken of the communication of January 20, 1915, from Mr. Bryan, as Secretary of State for the United States Government, to Mr. Stone, of the Foreign Relations Committee of the Senate. It is, indeed, a State document. In it the Secretary of State, dealing with absolute and conditional contraband, puts on record the following as the views of the United States Government:—

"The rights and interests of belligerents and neutrals are opposed in respect to contraband articles and trade. . . . . The record of the United States in the past is not free from criticism. When neutral, this Government has stood for a restricted list of absolute and conditional contraband. As a belligerent, we have contended for a liberal list, according to our conception of the necessities of the case.

"The United States has made earnest representations to Great Britain in regard to the seizure and detention of all American ships or cargoes bona fide destined to neutral ports. . . . . It will be recalled, however, that American Courts have established various rules bearing on these matters. The rule of 'continuous voyage' has been not only asserted by American tribunals, but extended by them. They have exercised the right to determine from the circumstances whether the ostensible was the real destination. They have held that the shipment of articles of contraband to a neutral port 'to order' (this was of course before the Order in Council of October 29), from which, as a matter of fact, cargoes had been transhipped to the enemy, is corroborative evidence that the cargo is really destined to the enemy instead of to the neutral port of delivery. It is thus seen that some of the doctrines which appear to bear harshly upon

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neutrals at the present time are analogous to or outgrowths from policies adopted by the United States when it was a belligerent. The Government, therefore, cannot consistently protest against the application of rules which it has followed in the past, unless they have not been practised as heretofore. . . . . The fact that the commerce of the United States is interrupted by Great Britain is consequent upon the superiority of her navy on the high seas. History shows that whenever a country has possessed the superiority our trade has been interrupted, and that few articles essential to the prosecution of the war have been allowed to reach its enemy from this country."

It is not necessary to dilate further upon the history of the doctrine in question.

I have no hesitation in pronouncing that, in my view, the doctrine of continuous voyage, or transportation, both in relation to carriage by sea and to carriage over land, had become part of the law of nations at the commencement of the present war, in accordance with the principles of recognized legal decisions, and with the view of the great body of modern jurists, and also with the practice of nations in recent maritime warfare.

The result is that the Court is not restricted in its vision to the primary consignments of the goods in these cases to the neutral port of Copenhagen; but is entitled, and bound, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible and, if so, what the real ultimate destination was.

As to the real destination of a cargo, one of the chief tests is whether it was consigned to the neutral port to be there delivered for the purpose of being imported into the common stock of the country. This test was applied over a century ago by Sir William Grant in the Court of Appeal in prize cases in the case of *The William*. (1) It was adopted by the United States Supreme Court in their unanimous judgment in *The Bermuda* (2), where Chase C.J., in delivering the judgment, said: "Neutrals may convey in neutral ships, from one neutral port to another, any goods, whether contraband of war or not,

(1) (1806) 5 C. Rob. 385. (2) 3 Wall. 514.

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if intended for actual delivery at the port of destination, and *to become part of the common stock of the country or of the port.*"

Another circumstance which has been regarded as important in determining the question of real or ostensible destination at the neutral port was the consignment "to order or assigns" without naming any consignee.

In the celebrated case of *The Springbok* (1) the Supreme Court of the United States acted upon inferences as to destination (in the case of blockade) on this very ground. The part of the judgment dealing with the matter is as follows:—

"That some other destination than Nassau was intended may be inferred from the fact that the consignment, shown by the bills of lading, and the manifest was *to order or assigns.* Under the circumstances of this trade, such a consignment must be taken as a negation that any such sale was intended to be made there; for had such sale been intended it is most likely that the goods would have been consigned for that purpose to some established house named in the bills of lading."

The same circumstance was also similarly dealt with in *The Bermuda* (2) and in *The Peterhoff.* (3)

I am not unmindful of the argument that consignment "to order" is common in these days. But a similar argument was used in *The Springbok* (1), supported by the testimony of some of the principal brokers in London, to the effect that a consignment "to order or assign" was the usual and regular form of consignment to an agent for sale at such a port as Nassau. The British Government was petitioned to intervene for the shippers; but upon this point the British Foreign Office said that "no doubt the form was usual in the time of peace, but that a practice which might be perfectly regular in time of peace under the municipal regulations of a particular State, would not always satisfy the law of nations in time of war, more particularly when the voyage might expose the ship to the visit of belligerent cruisers"; and added that, "having regard to the very doubtful character of all trade ostensibly carried on at

(1) 5 Wall. 1.
(2) 3 Wall. 514.
(3) 5 Wall. at p. 25; and see Blatch. Pr. Cas. 463, at p. 540.

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Nassau during the war in the United States, and to many other circumstances of suspicion before the Court, Her Majesty's Government are not disposed to consider the argument of the Court upon this point as otherwise than tenable."

The argument still remains good, that if shippers, after the outbreak of war, consign goods of the nature of contraband to their own order without naming a consignee, it may be a circumstance of suspicion in considering the question whether the goods were really intended for the neutral destination, and to become part of the common stock of the neutral country, or whether they had another ultimate destination. Of course, it is not conclusive. The suspicion arising from this form of consignment during war might be dispelled by evidence produced by the shippers. It may be here observed that some point was made that in many of the consignments the bills of lading were not made out "to order" simpliciter, but to branches or agents of the shippers. That circumstance does not, in my opinion, make any material difference.

Other matters relating to destination will be discussed upon the second branch of the case, namely, whether the goods were destined for Government or military use. Wherever destination comes in question, certainty as to it is seldom possible in such cases as these; "highly probable destination" is enough in the absence of satisfactory evidence for the shippers: see per Lord Stowell in *The Jonge Margaretha.* (1)

Upon this branch of the case—for reasons which have been given when dealing with the consignments generally, and when stating the circumstances with respect to each claim—I have no hesitation in stating my conclusion that the cargoes (other than the small portions acquired by persons in Scandinavia whose claims are allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery; but that the cargoes were on their way at the time of capture to German territory as their actual and real destination.

The second branch of the case raises the question whether the

(1) 1 C. Rob. 189, at p. 192.

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goods, which I have decided were on their way to German territory, were destined further for the use of the German Government or departments or for military use by the troops, or other persons actually engaged in warlike operations, or should be presumed to be so destined in the circumstances.

As a preliminary, it becomes necessary to consider the two Orders in Council of August 20 and October 29, 1914.

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It was contended for the claimants that before the seizure of the cargoes on the first three vessels, and while they were still on their respective voyages, the Order in Council of August 20 (even if it was binding on the Court) had been rendered inoperative by the repeal contained in the Order of October 29.

It was further contended that the two Orders in Council purporting to give effect with certain additions and modifications to the unratified "Declaration of London" had no binding effect upon this Court and ought to be disregarded.

As to the first of these two contentions, no doubt if the first Order had affected the substantive rights of the neutral, e.g., if it had declared an article as absolute contraband, which by the repealing Order had been removed from the list of contraband before capture, it could not be said that the Order had remained operative so as to justify the seizure of the article; but in reality the only change (material to these cases) which the Order purported to make was in the nature of alteration of practice as to evidence—namely, by adding certain presumptions to those contained in art. 34 of the Declaration of London; and all these presumptions, whether set up in the interest of the captor or against him, are rebuttable (see M. Renault's Report on the Declaration). The Order had proclaimed to the neutral owners of the cargoes before the voyages commenced how in practice as matter of evidence and proof cargoes seized would be dealt with, and it might fairly be argued that they could not complain if their cases were treated in accordance with the Order; but it is not necessary for me to pronounce any decision upon the point. I will, for the purposes of this case, assume that the Order of August 20 had ceased to have any effect upon the promulgation of the subsequent Order. The result is that cases relating to

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the *A. Nobel*, *B. Bjornson*, and the *Fridland* must be decided in accordance with the rules of international law.

The Order of October 29 applies, however, to all the cargoes on the *Kim*.

As to the contention that the Order is not binding on this Court, I expressed my views on the general question of the binding character of Orders in Council upon the Prize Court in the case of *The Zamora*. (1) I do not wish to detract anything from what I then said; nor do I deem it necessary at present to add anything as to the general principles; but as to this Order, so far as it affects questions arising in these proceedings, it is right to point out that no provision in it can possibly be said to be in violation of any rule or principle of international law. It is true that in a matter of real substance it alters the proposed compromise incorporated in art. 35 of the Declaration of London, whereby, if the declaration had been ratified, the doctrine of continuous voyage would have been excluded for conditional contraband.

The provision in art. 35 was described by Sir Robert Finlay (counsel for several of the claimants) as "an innovation in international law as hitherto recognized in the United States and by Great Britain and other States, introducing an innovation of the first importance by excluding the doctrine of continuous voyage in the case of conditional contraband."

What the Order in Council did, therefore, was to prevent the innovation. In this regard it therefore proceeded, not in violation of, but upon the basis of, the existing international law upon the subject.

It may be well to note, and to record, that at the London Conference which produced the Declaration all the Allied Powers engaged in this war, and also the United States, had been in favour of continuing to apply the doctrine of continuous voyage or continuous transportation to conditional as well as to absolute contraband, a doctrine which, as we have seen, was nurtured and specially favoured by the Courts of the United States.

As to the modifications regarding presumptions and onus of

(1) June 21, 1915, 31 Times L. R. 513. Under appeal to the Judicial Committee of the Privy Council.

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proof, as, for instance, where goods are consigned "to order" without naming a consignee, these are matters really affecting rules of evidence and methods of proof in this Court, and I fail to see how it is possible to contend that they are violations of any rule of international law.

The effect of the Order in Council is that, in addition to the presumptions laid down in art. 34 of the "Declaration of London," a presumption of enemy destination as defined by art. 33 shall be presumed to exist if the goods are consigned to or for an agent of the enemy State, or to a person in the enemy territory, or if they are consigned "to order," or if the ship's papers do not show who the consignee is; but in the latter cases the owners may, if they are able, prove that the destination is innocent.

All the goods claimed by the shippers on the *Kim* were consigned to their own order, or to the order of their agents (which is the same thing), and not to any independent consignee; and they have all entirely failed to discharge the onus which lies upon them to prove that their destination was innocent.

There was some suggestion that liability to capture in the Declaration of London and Order in Council did not mean liability to confiscation or condemnation. On reference to the various provisions as to absolute and conditional contraband, it is clear that it is used in that sense.

I am of opinion that under the Order in Council the goods claimed by all the shippers on the *Kim* were confiscable as lawful prize.

I now proceed to consider the confiscability of the cargoes on all the four vessels, apart entirely from the operation of the Order in Council upon the *Kim* cargoes.

Having decided that the cargoes, though ostensibly destined for Copenhagen, were in reality destined for Germany, the question remains whether their real ultimate destination was for the use of the German Government or its naval or military forces.

If the goods were destined for Germany, what are the facts and the law bearing upon the question whether they had the further hostile destination for the German Government for military use?

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In the first place, as has already been pointed out, they were goods adapted for such use ; and further, in part, adapted for immediate warlike purposes in the sense that some of them could be employed for the production of explosives. They were destined, too, for some of the nearest German ports like Hamburg, Lübeck, and Stettin, where some of the forces were quartered, and whose connection with the operations of war has been stated. It is by no means necessary that the Court should be able to fix the exact port: see *The Dolphin* (1); *The Pearl* (2); *The Peterhoff.* (3)

Regard must also be had to the state of things in Germany during this war in relation to the military forces, and to the civil population, and to the method described in evidence which was adopted by the Government in order to procure supplies for the forces.

The general situation was described by the British Foreign Secretary in his Note to the American Government on February 10, 1915, as follows:—

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military that they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs in the country."—I am not saying that the last sentence is applicable to the circumstances of this case.— . . . .

"In the peculiar circumstances of the present struggle where the forces of the enemy comprise so large a proportion of the population, and where there is so little evidence of shipments on

(1) Ante, p. 251. (2) (1866) 5 Wall. 574.
(3) 5 Wall. 28, at p. 59.

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private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon claimants."

It was given in evidence that about ten millions of men were either serving in the German army, or dependent upon or under the control of the military authorities of the German Government, out of a population of between 65 and 70 millions of men, women, and children. Of the food required for the population, it would not be extravagant to estimate that at least one-fourth would be consumed by these 10 million adults.

Apart altogether from the special adaptability of these cargoes for the armed forces, and the highly probable inference that they were destined for the forces, even assuming that they were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces.

So much as to the probable ultimate destination in fact of the cargoes.

Now as to the question of the proof of intention on the part of the shippers of the cargoes.

It was argued that the Crown as captors ought to show that there was an original intention by the shippers to supply the goods to the enemy Government or the armed forces at the inception of the voyage as one complete commercial transaction, evidenced by a contract of sale or something equivalent to it.

It is obvious from a consideration of the whole scheme of conduct of the shippers that if they had expressly arranged to consign the cargoes to the German Government for the armed forces, this would have been done in such a way as to make it as difficult as possible for belligerents to detect it.

If the captors had to prove such an arrangement affirmatively and absolutely, in order to justify capture and condemnation, the rights of belligerents to stop articles of conditional contraband from reaching the hostile destination would become nugatory.

It is not a crime to dispatch contraband to belligerents. It can be quite legitimately sent subject to the risk of capture; but the argument proceeded as if it were essential for the captors to prove the intention as strictly as would be necessary in a criminal trial;

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and as if all the shippers need do was to be silent, to offer no explanation, and to adopt the attitude towards the Crown, "Prove our hostile intention if you can."

In the first place, it may be observed that it is not necessary that an intention at the commencement of the voyage should be established by the captors either absolutely or by inference.

In *The Bermuda* (1) the Chief Justice of the Supreme Court of the United States, in referring to the decision of Sir William Grant in *The William* (2), said:—

"If there be an intention, either formed at the time of the original shipment, *or afterwards*, to send the goods forward to an unlawful destination, the continuity of the voyage will not be broken, as to the cargo, by any transactions at the intermediate port."

It is, no doubt, incumbent upon the captors in the first instance to prove facts from which a reasonable inference of hostile destination can be drawn, subject to rebuttal by the claimants.

Lord Granville as Foreign Secretary in 1885, in a Note to M. Waddington (the French Ambassador) which had reference to the question of rice being declared contraband by the French Government in relation to China, said:—

"There must be circumstances relative to any particular cargo, or its destination, to displace the presumption that articles of food are intended for the ordinary use of life, and to show, prima facie at all events, that they are destined for military use, before they could be treated as contraband."

And Lord Lansdowne as Foreign Secretary in 1904, in a Note to the British Ambassador at St. Petersburg, stated the British view thus:—

"The true test appears to be whether there are circumstances relating to any particular cargo to show that it is destined for military or naval use."

These statements, so qualified, it will be noted, were made when this country was making representations against the action of foreign Governments concerning conditional contraband. Therefore they were put as high, I assume, as it was thought they properly could be put.

(1) 3 Wall. 514. (2) 5 C. Rob. 385.

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So far as it is necessary to establish intention on the part of the shippers, it appears to me to be beyond question that it can be shown by inferences from surrounding circumstances relating to the shipment of and dealings with the goods.

Cargoes are inanimate things, and they must be sent on their way by persons. If that is all that was meant by counsel for the claimants, when they argued that "intention" must be proved, their contention may be conceded. But it need not be an "intention" proved strictly to have existed at the beginning of the voyage, or as an obligation under a definite commercial bargain.

If at the time of the seizure the goods were in fact on their way to the enemy Government or its forces as their real ultimate destination, by the action of the shippers, whenever the project was conceived, or however it was to be carried out; if, in truth, it is reasonably certain that the shippers must have known that that was the real ultimate destination of the goods (apart of course from any genuine sale to be made at some intermediate place), the belligerent had a right to stop the goods on their way, and to seize them as confiscable goods.

In the circumstances of these cases, especially in view of the opportunity given to the claimants, who possess the best and fullest knowledge of the facts, to answer the cases made against them, any fair tribunal, like a jury, or an arbitrator, whose duty it was to judge facts, not only might but almost certainly would come to the conclusion that at the time of the seizure the goods which remained the property of the shippers were, if not as to the whole, at any rate as to a substantial proportion of them at the time of seizure on their way to the enemy for its hostile uses. The facts in these cases, in my opinion, more than amply satisfy the "highly probable destination" spoken of by Lord Stowell.

Before I conclude I will make reference to an opinion expressed, towards the end of last year, by a body of men eminent as students and expositors of international law in America, in the editorial comment in the *American Journal of International Law*, to which my attention was called by the law officers. Amongst them I need only name Mr. Chandler Anderson, Mr.

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It is as follows:—

"In a war in which the nation is in arms, where every able-bodied man is under arms and is performing military duty, and where the non-combatant population is organised so as to support the soldiers in the field, it seems likely that belligerents will be inclined to consider destination to the enemy country as sufficient, even in the case of conditional contraband, especially if the Government of the enemy possesses and exercises the right of confiscating or appropriating to naval or military uses the property of its citizens or subjects of service to the armies in the field."

I cite this, not of course as any authority, but as showing how these eminent American jurists acknowledge that international law must have regard to the actual circumstances of the times.

I have not in this judgment followed the course thus indicated by them as a likely and reasonable one in the present state of affairs. I have preferred to proceed on the lines of the old recognized authorities.

I wish also to note the opinion recently expressed by the Hamburg Prize Court in the case of *The Maria*, decided in April last, where goods consigned from the United States to Irish ports were laden upon a Dutch vessel.

I refer to it, not because I look upon it as profitable or helpful (on the contrary, I agree with Sir R. Finlay that it should rather be regarded as "a shocking example"), but because it is not uninteresting as an example of the ease with which a Prize Court in Germany "hacks its way through" bona fide commercial transactions when dealing with foodstuffs carried by neutral vessels.

Be it remembered, too, that the Court was dealing with wheat which was shipped from America before the war, and which had also before the war been sold in the ordinary course of business to well-known British merchants, R. & H. Hall, Limited.

This is what the Hamburg Court said:—

"There is no means of ascertaining with the least certainty

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what use the wheat would have been put to at the arrival of the vessel in Belfast, and whether the British Government would not have come upon the scene as purchaser, even at a very high price, and in this connection it must also be borne in mind that the bills of lading were made out to order, which greatly facilitated the free disposal of the cargo. That at the time of the conclusion of the contract concerning the acquisition of the wheat on the part of R. & H. Hall, Limited, the possibility of using the same for war purposes had, perhaps, not been contemplated, does not affect the question what actual use would have been made of the cargo of wheat after the outbreak of war in October, 1914."

For the many reasons which I have given in the course of this judgment and which do not require recapitulation, or even summary, I have come to the clear conclusion from the facts proved, and the reasonable and, indeed, irresistible inferences from them, that the cargoes claimed by the shippers as belonging to them at the time of seizure were not on their way to Denmark to be incorporated into the common stock of that country by consumption, or bona fide sale, or otherwise; but, on the contrary, that they were on their way not only to German territory, but also to the German Government and their forces for naval and military use as their real ultimate destination.

To hold the contrary would be to allow one's eyes to be filled by the dust of theories and technicalities, and to be blinded to the realities of the case.

Even if this conclusion were only accurate as to a substantial proportion of the goods, the whole would be affected; because

"Contraband articles are said to be of an infectious nature, and they contaminate the whole cargo belonging to the same owners. The innocence of any particular article is not usually admitted to exempt it from the general confiscation." (Kent's Commentaries, 12th ed., by Holmes J., p. 142.) (See to the same effect *The Springbok* (1) and *The Peterhoff*. (2))

The Declaration of London (art. 42) is to the same effect; and M. Renault's report on it is:—

"The owner of the contraband is punished in the first place

(1) (1863) Blatch. Pr. Cas. 434, at p. 451. (2) (1866) 5 Wall. 28, at p. 59.

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by the condemnation of his contraband property, and in the second by that of the goods, even if innocent, which he may possess on board the same vessel."

It only remains, to conclude these long and troublesome cases, to state the results as applied to each of the claims:—

I disallow the claims of Morris & Co., Armour & Co., Hammond & Co. (with Swift & Co.), Sulzberger & Sons Company, Pay & Co., Brödr Levy, Elwarth, Buch & Co., Hansen, Pedersen, Henriques and Zoydner, Korsor Fabrik, Dania Fabrik, Valeur, Baird, and Marcus & Co., and pronounce condemnation as prize of the goods comprised in them or of their proceeds, if sold.

I allow the claims of Cudahy & Co., the Provision Import Company, Christensen and Thoegersen, Segelcke, Frigast, Bunchs Fed., Loehr, and Ullman & Co., and order the goods comprised in them or the net proceeds thereof, if sold, to be released to the respective claimants.

Stay pending appeal within six weeks in respect of claims disallowed. Costs to be secured to the extent of 5000*l.* *to be allocated between the various appellants. The cases of the ships themselves to stand over.*

Solicitor for the Crown: *The Treasury Solicitor.*

Solicitors for claimants: *William A. Crump & Son; Botterell & Roche; Rawle, Johnstone & Co.; Pritchard & Sons, for Alsop, Stevens, Crooks & Co., Liverpool; Windybank, Samuell & Lawrence, for Luya & Williams, Liverpool; Batesons, Warr & Wimshurst, Liverpool; Parker, Garrett & Co.; Crosley & Burn; Thomas Cooper & Co.*

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SMITH *v.* SMITH.

Divorce—Desertion—Separation Deed—Husband's previous Threat to break up the Home—Stoppage of Payments under the Deed.

A husband, having threatened to break up the matrimonial home, entered into a deed of separation, but, after a short time, he made no further payments to his wife under the deed.

Upon a petition by the wife:—

Held, that he was guilty of desertion, and, upon proof of his adultery, the wife was entitled to a decree nisi dissolving the marriage.

Quaere, whether the mere failure to pay an allowance provided by the terms of a deed of separation would constitute desertion.

Wife's petition for dissolution of marriage on the ground of desertion and adultery.

The suit was undefended.

The petitioner and respondent were married in 1907, and there were no children of the marriage. About the middle of March, 1912, the respondent told the petitioner that he had arranged to sell the furniture and had told the landlord that he would give up the tenancy of the home at quarter day.

A deed of separation, dated March 26, 1912, was thereupon executed.

The deed contained (inter alia) a covenant by the husband to pay his wife 1*l.* a week, and a covenant by the wife not to sue for restitution of conjugal rights.

After making a few payments, the husband left this country in June, 1912, with a woman with whom he was now proved to have committed adultery. The payments under the deed ceased about the time when the husband left England.

D. Cotes Preedy (*Stuart Bevan* with him), for the petitioner. The facts are similar to those in *Hussey* v. *Hussey* (1), where the President (Sir Samuel Evans) applied the principle laid down in *Balcombe* v. *Balcombe* (2), where Lord Gorell, in similar circumstances, held that there was desertion since the husband had repudiated the deed of separation.

(1) (1913) 109 L. T. 192. (2) [1908] P. 176.

HORRIDGE J. The adultery is proved, and I will follow the case of *Hussey* v. *Hussey* (1) in regard to the charge of desertion, unless I find that that case has since been questioned.

Cur. adv. vult.

Oct. 16. HORRIDGE J. I am prepared to hold that there was desertion, but I do so on the particular facts of this case, and especially in view of the fact that the husband had threatened to break up the home before the date of the deed of separation, and the further fact that very shortly after the deed was executed he failed to pay his wife the allowance under the deed.

It must not be taken, where parties separate under a deed, that I should hold there has been desertion merely because the husband has failed to pay the allowance provided by the deed.

In this case I pronounce a decree nisi with costs.

Solicitors: *Guscotte, Wadham, Tickell & Co., for Burges & Sloan, Bristol.*

(1) 109 L. T. 192.

H. D. G.

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July 15, 16.

[IN THE COURT OF APPEAL.]

THE LEON BLUM.

[1914 Folio 2.]

Admiralty—Salvage—Construction of Contract—Claim by Tug Owner against Cargo Owner—Agreement between Shipowner and Tug Owner as to "no salvage charges"—Protection of Seamen against Abandonment of Right to Salvage—Merchant Shipping Act, 1894 (57 & 58 *Vict. c.* 60), *s.* 156.

Where a vessel carrying cargo was being towed under a contract made between the owners of the tug and the owners of the vessel in tow on the terms of "no cure, no pay, no salvage charges," and, before the towage came to an end, the vessel was in danger, and salvage services were rendered by the tug to ship and cargo :—

Held by the Court of Appeal (Swinfen Eady, Phillimore, and Bankes L.JJ.), affirming the decision of the President (Sir Samuel Evans) [1915] P. 90, that the owners of the tug and her master and crew were entitled to maintain an action to recover salvage remuneration from the owners of the cargo.

Appeal in an action of salvage upon a preliminary point of law, namely, whether the owners, master, and crew of a tug could recover salvage remuneration from the owners of cargo where an agreement existed between the shipowners and the tug owners as to "no salvage charges."

The appellants (defendants) were the owners of cargo lately laden on board the *Leon Blum*, and the owners of the *Leon Blum*.

The respondents (plaintiffs) were the owners, master, and crew of the steam tug *Vanquisher*.

On December 9, 1913, the *Leon Blum*—a full-rigged steel ship of 2733 tons register, belonging to the port of Nantes in the Republic of France—was on a voyage from Pisagua to Liverpool, via Falmouth, with a cargo of nitrate, and in tow (from Falmouth) of the respondents' (plaintiffs') tug *Vanquisher*. She had arrived off the Formby lightship, in charge of a pilot, when it was alleged by the plaintiffs that her position became critical owing to her port anchor dropping and the chain running out, that the tug *Vanquisher* thereupon rendered salvage services, and, it was further alleged, that the tug prevented the vessel from subsequently going ashore and the cargo being lost.

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On January 1, 1914, the plaintiffs, as the owners, master, and crew of the tug *Vanquisher*, issued a writ against the owners and parties interested in the cargo lately laden on board the *Leon Blum*, claiming remuneration for the above mentioned salvage services alleged to have been rendered, and on February 12 delivered their statement of claim.

On March 19, the owners of the *Leon Blum*, the Société Nouvelle d'Armement, applied for an order that all further proceedings in the action be stayed on the ground that the plaintiffs, the owners of the steam tug *Vanquisher*, contracted with the owners of the *Leon Blum*, prior to the commencement of the towage of the *Leon Blum* (during which towage the salvage services the subject-matter of the action were alleged to have been performed), that no claim should be made against the owners of the cargo on board the *Leon Blum* in respect of any salvage services that might be rendered by the *Vanquisher* to the *Leon Blum* during the said towage, and that the proceeding with this action was in breach of the said contract.

On behalf of the plaintiffs, the owners of the tug *Vanquisher*, the preliminary objection was taken that the owners of the *Leon Blum* were not parties to the action, and, therefore, that their intervention, by way of motion to stay proceedings, was irregular. (1) Bargrave Deane J. made no order on the motion; but directed that the owners of the *Leon Blum* should be made parties, and that, at the trial, the point of law, as to the construction of the alleged contract, should be first argued.

On May 9, the motion, by way of interlocutory appeal, came before the Court of Appeal (Buckley and Kennedy L.JJ.), when the Court dismissed the appeal with costs on the ground that the learned judge in the Court below had rightly exercised his discretion in providing that the question as to the existence of the alleged agreement should be first litigated in the presence of the three parties interested, namely, the owners of the tug *Vanquisher*, the owners of the *Leon Blum*, and the owners of the cargo on board that vessel at the time of the alleged salvage services.

On May 28, two witnesses were examined before the President

(1) See [1914] W. N. 184.

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with reference to the alleged agreement not to make any claim for salvage services, and, on June 9, the preliminary point of law was argued as to the validity of the claim of the plaintiffs against the owners of the cargo.

On July 31, the President (Sir Samuel Evans) delivered a considered judgment (1), in which he found that the substance of the alleged contract was embodied in a letter, dated July 17, 1913, from the Elliott Steam Tug Company, Limited, the owners of the tug *Vanquisher*, to the Société Nouvelle d'Armement, the owners of the *Leon Blum*. The material portion of the letter ran: "we confirm the verbal arrangement which we came to, whereby it is agreed whenever our tugs are engaged to tow any of your vessels, whether the contract be made by your good selves or by one of your masters, it shall be on the basis of 'no cure no pay, no salvage charges.'"

On the question whether the owners of the cargo were parties, directly or indirectly, to the alleged agreement, the learned President found that "the parties to the contract were the tug owners and the shipowners, and no others. The shipowners acted only for themselves, and not as agents for the owners of the cargo . . . . and there was no evidence and no suggestion that the tug owners were aware that the vessel was laden with cargo. Further the cargo owners had no knowledge of the terms of the contract . . . . Again, there was no evidence, or suggestion, that the shipowners in entering into the contract or at any time gave any intimation to the cargo owners that the business of the shipowners was carried on, or that their freights were charged, upon the basis that in cases of towage they had provided for 'no cure no pay, no salvage charges.'"

The learned President, therefore, held that "although the tug owners have . . . . agreed not to make any salvage charges against the ship and freight, they are not precluded from claiming and recovering salvage remuneration in respect of the cargo against the cargo owners who were not in any way parties to the towage contract," and, further, that, in any event, the master and crew of the tug were "entitled to recover salvage from the cargo owners," and "even if the seamen had been persuaded to

(1) Set out in full in [1915] P. 90, at pp. 92—104.

join in the agreement by which it is said they abandoned, or precluded themselves from claiming, salvage reward, such an agreement would be wholly inoperative" by reason of s. 156 of the Merchant Shipping Act, 1894.

The learned President, therefore, gave judgment in favour of the plaintiffs "upon the preliminary point of law as to the validity of the claims of the plaintiffs against the owners of the cargo for salvage services rendered (if any) in respect of the cargo."

On appeal:—

Laing, K.C., and *A. R. Kennedy*, for the defendant owners of cargo, and the owners of the *Leon Blum*.

Bateson, K.C., and *C. Robertson Dunlop*, for the respondents (plaintiffs), the owners, master, and crew of the steam tug *Vanquisher*.

The arguments of counsel sufficiently appear from the judgment of:—

SWINFEN EADY L.J. This is an appeal from the judgment of the President upon a preliminary point of law arising in a salvage action.

Proceedings were brought in admiralty by the owners, master, and crew of the tug *Vanquisher* against the owners of the cargo on the *Leon Blum*, claiming salvage. As originally brought the action was against the cargo owners only, and then a motion was made to stay that action, upon the ground that the plaintiffs, the owners of the tug, had contracted with the owners of the ship before the commencement of the towage "that no claim should be made against the owners of the cargo on board the *Leon Blum* in respect of any salvage services that might be rendered" by the tug to the ship during the towage. Upon that motion an order was made that the action should be placed in the list for argument on the point of law only.

Now, the point of law has not been otherwise defined than by the motion to stay. There is no point of law formulated in terms, but only raised in the manner I have mentioned. After the order on that motion to stay, the owners of the ship were made parties to the proceedings, and put in a defence, and upon that the

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point of law came on to be heard before the judge. I conceive that the only point of law, therefore, is whether, having regard to the terms of the contract, the claim against the cargo, first by the owners and secondly by the master and crew of the tug, is excluded. Although the action was directed to be heard on this point of law, it appears that evidence was gone into and witnesses were examined and cross-examined, but I pass that by because our attention has not been directed to that evidence or any part of it, and it is conceded that that evidence is inadmissible upon the simple point of law that is raised in this way. It appears that the contract in question is contained in two documents which have to be read together. In July, 1913, correspondence took place between the owners of the ship and the owners of the tug as to the terms upon which towage contracts were to be entered into between them, and ultimately on July 17, 1913, the owners of the tug wrote a letter containing the words upon which the appellants rely. That letter is as follows:—

"We have to-day had the pleasure of a visit from Mons. Jouteau, and we confirm the verbal arrangement which we came to, whereby it is agreed whenever our tugs are engaged to tow any of your vessels, whether the contract be made by your good selves or by one of your masters, it shall be on the basis of 'no cure no pay, no salvage charges.' Trusting this may lead to a good business between the two companies."

The effect of that is to treat as imported into subsequent towage contracts between the parties "no cure no pay, no salvage charges." The contract in question with regard to this particular vessel was made on December 2, 1913. An arrangement was made for the towage of the ship *Leon Blum* by one tug from Falmouth to Liverpool, including the use of the tug's hawser, for 65*l.*, and then follow the formal conditions of the contract. Now, it is conceded for the purpose of this case that on the voyage from Falmouth to Liverpool circumstances arose which, but for any special terms of the contract, would have entitled the tug to be paid for salvage services. The details of what happened are not material. In the Court below it was dealt with upon this footing. It was said (1): "For the purposes of this argument it is admitted

(1) See [1915] P. 90, at p. 95.

that before the towage was completed the tug *Vanquisher*, her master and crew, rendered salvage services to the vessel, cargo, and freight, in respect of which, apart from any towage contract, they would be entitled to salvage remuneration." And then a little later in the President's judgment: "The services in respect of which the claim is now made were, ex concessis, salvage services." So the details of the services are not material, but the question we have to consider is, whatever those salvage services were, does the contract exclude liability to the owners and master and crew of the tug, in respect of a claim against the cargo? In the defence set up, and in the notice of motion to stay, it is set out that the plaintiffs had contracted that "no claim should be made against the owners of the cargo on board the *Leon Blum* in respect of any salvage services that might be rendered"; but that is the construction which the pleader puts upon the contract. It is not the language of the contract; and in their defence the owners of the *Leon Blum* raise the contention that it was a term of the contract "that no claim should be made for reward for any salvage services which might be rendered by the *Vanquisher* to the *Leon Blum*, her cargo or freight." That is not the language of the contract—not in terms—and the language which the pleader relies upon as justifying his allegation is the words "no salvage charges"; and he expands that into meaning that neither against the ship nor cargo shall any claim be made by the tug in respect of salvage services rendered. It is not suggested there was any authority—that the owners had any special authority—to bind either the master or crew with regard to any claim they might have for salvage. By the Merchant Shipping Act, 1894, s. 156, "A seaman shall not . . . . abandon any right that he may have or obtain in the nature of salvage; and every stipulation in any agreement inconsistent with any provision of this Act shall be void"; and sub-s. 2 says: "Nothing in this section shall apply to a stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service with respect to the remuneration to be paid to them for salvage services to be rendered by that ship to any other ship."

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Having regard to the statutory provision in s. 156, it has not been contended by the appellants that really there was any agreement binding the crew not to claim salvage. Then, with regard to the master, there was no evidence at all that the contract was entered into with the assent or knowledge of the master; and it was a contract made —that is to say, the original language, "no cure no pay, no salvage charges," was resolved upon in July as a term to be inserted in all future contracts, and so the language of the contract was settled without reference to this particular towage, and in my opinion there was no authority on the part of the owners to bind either the master or the crew, not as to the amount to be paid for salvage, but that they should not in any circumstances receive any salvage remuneration. Therefore, so far as regards the master and crew I am of opinion that there is nothing in the point of law raised that disentitles them to sue the owners of cargo for salvage.

The next question is with regard to the owners of the tug. Can the owners of the tug sue? It was not contended that there was any authority from the owners of cargo to the shipowners to enter into this contract on their behalf. The President said on that point:

"The cargo owners had no knowledge of the terms of the contract, or collateral contract. Again, there was no evidence, or suggestion, that the shipowners in entering into the contract or at any time gave any intimation to the cargo owners that the business of the shipowners was carried on, or that their freights were charged, upon the basis that in cases of towage they had provided for 'no cure no pay, no salvage charges.'"

There was no contention put forward before us that the shipowners entered into this contract as agents for and on behalf of the cargo owners; but it was put in this way, that the cargo is on board the ship and that the agreement by the shipowners enures for the benefit of the cargo. Now, there is a reference to the cargo in what I will refer to as the formal printed contract, but the reference to the cargo in the two places in which the formal contract refers to the cargo gives no assistance to the appellants on this point. The first reference

to the cargo is with regard to the liability for loss. Later on there is a provision that the owners of the ship or of the cargo on board the same shall and do undertake to indemnify the tug owners against all liability for any of the above mentioned matters. Whatever the cause and effect be of that provision, it has no bearing upon the point we have to decide to-day. Except for that, there is no reference to cargo at all, and in my opinion the mere fact that the ship contracts in a contract of towage that there shall be "no cure, no pay, no salvage charges," does not of itself import that whatever services the tug as salvor may render to the cargo, the cargo shall be under no liability to pay for it. It is a stipulation entirely outside this contract. It is sufficient to dispose of the case on those two short points. No question was raised before us with regard to the effect of this clause upon the liability of the ship to the owners of the tug. I only deal with the two points that were really material for our decision—the claim of the owners of the tug, and the claim of the master and crew of the tug, against the cargo. In my opinion, there is nothing in the contract to exclude either one or the other, and for those reasons I am of opinion that the appeal should be dismissed.

PHILLIMORE and BANKES L.JJ. concurred.

Appeal dismissed with costs.

Solicitors for plaintiffs, the owners, master, and crew of the steam tug *Vanquisher: Thomas Cooper & Co.*

Solicitors for defendants: *Pritchard & Sons, for Simpson, North, Harley & Co., Liverpool.*

T. L. M.

THE END.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1915, will be as follows:—

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In the Second Series,
[1915] 1 K. B. [1915] 2 K. B. [1915] 3 K. B. [1915] P.

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—— "*Harberton*," *The* - - [1913] P. 149
Referred to. THE "ANCONA" [**1915**] **P. 200**

—— "*Jonge Margaretha*," *The* (1799) 1 C. Rob. 189.
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—— "*Leon Blum*," *The* - - [1915] P. 90
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—— *Napier* v. *Napier* (*otherwise Goodban*) [1915] P. 65.
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—— *Peverett* (*Frances*), *In the Goods of* [1902] P. 205.
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DIVORCE — *Costs — Practice — Matrimonial Causes Act*, 1878 (41 *&* 42 *Vict. c.* 19), *s.* 2—*Wife's Petition — King's Proctor's Plea — No Answer — No Evidence of Separate Estate — Petitioner condemned in Costs.*

The discretion as to costs, given to the Court by s. 2 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19), is an absolute discretion, to be exercised according to the facts and circumstances of each particular case; and where the petition is by the wife, she may be condemned in the costs of the King's Proctor, who has intervened under that section and successfully shown cause against the decree nisi being made absolute, notwithstanding the fact that there is no evidence that the petitioner has or ever had separate estate. KENNARD *v.* KENNARD (THE KING'S PROCTOR SHOWING CAUSE). MORRIS *v.* MORRIS (THE KING'S PROCTOR SHOWING CAUSE) - **Bargrave Deane J.** 194

2. —— *Desertion — Separation Deed—Husband's previous Threat to break up the Home—Stoppage of Payments under the Deed.*

A husband, having threatened to break up the matrimonial home, entered into a deed of separation, but, after a short time, he made no further payments to his wife under the deed.

Upon a petition by the wife:—

Held, that he was guilty of desertion, and, upon proof of his adultery, the wife was entitled to a decree nisi dissolving the marriage.

Quaere, whether the mere failure to pay an allowance provided by the terms of a deed of separation would constitute desertion. SMITH *v.* SMITH - - - - **Horridge J.** 288

3. —— *Evidence—Cross-Examinatian—Suggested Act of Adultery, not charged in Petition—Question excluded—Practice—Evidence Further Amendment Act*, 1869 (32 *&* 33 *Vict. c.* 68).

It is contrary to the spirit of the Evidence Further Amendment Act, 1869, s. 3, that a witness, called to give evidence in any proceeding

DIVORCE—*continued.*

instituted in consequence of adultery and having given evidence in the same proceeding in disproof of his or her alleged adultery, should be questioned as to an act or acts of adultery not alleged in the pleadings.

A respondent in a divorce suit, having denied upon oath the charges alleged in the petition, was asked whether he had not committed adultery on an earlier occasion, not charged in the petition, but, objecting to answer, he was not compelled to do so, and the question was disallowed. BROWN *v.* BROWN
Sir Samuel Evans, Pres. 83

4. —— *Maintenance—Petition for Reduction—Consent Order—Power to vary—Matrimonial Causes Act*, 1907 (7 *Edw.* 7, *c.* 12), *s.* 1, *sub-s.* 2 (*a*).

A wife upon whose petition for divorce a decree absolute had been made obtained an order for permanent maintenance against the husband, a retired Army officer, at the rate of 120*l.* per annum. The order was expressed to be made by consent, the maintenance to be paid "out of his present income and until further order." At the date of the order his only income was derived from his pension of 420*l.* per annum. He was afterwards obliged to commute a portion of his pension in order to pay the costs of the petition and to meet the expenses of illness from which he suffered. His income was thus reduced to 320*l.* per annum. The wife had since the order carried on a business which yielded her an income.

Upon a petition by the husband for reduction of the maintenance :—

Held, that notwithstanding the order was by consent and that the husband's reduction of income was brought about by his own act the Court had power under s. 1, sub-s. 2 (*a*), of the Matrimonial Causes Act, 1907, to modify the order, and in so doing ought to have regard to all the circumstances of the case, including both the reduction in the husband's income and the increase in that of the wife. HALL *v.* HALL
C. A. 105

5. —— *Misconduct of Husband Petitioner—Isolated Act—Birth of Child—No Disclosure at Hearing—No Condonation—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Exercise of Discretion.*

A husband, who had been living apart from his wife for some years, committed an isolated act of adultery, resulting in the birth of a child, and in an undefended suit obtained a decree nisi for dissolution of the marriage without disclosing the fact of his own adultery.

By reason of the separation, there had been no condonation by the wife of the husband's adultery.

The Court (the King's Proctor showing cause) exercised its discretion in favour of the petitioner upon the grounds of public morality and in the interests of the woman with whom the misconduct had been committed and of her child. SCHOFIELD *v.* SCHOFIELD (THE KING'S PROCTOR SHOWING CAUSE)
Sir Samuel Evans, Pres. 207

DIVORCE —*continued.*

6. —— *Nullity of Marriage—Refusal to allow Marital Intercourse—"Wilful and persistent"—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 22.

The decision in *Dickinson* v. *Dickinson* (*otherwise Phillips*) [1913] P. 198, that wilful and persistent refusal to allow marital intercourse is of itself a sufficient ground for a decree of nullity of marriage, is not justified in principle or by the authorities and must be overruled.

Decision of Sir Samuel Evans P. [1915] P. 65 affirmed on the facts. NAPIER *v.* NAPIER (OTHERWISE GOODBAN) - - - **C. A. 184**

7. —— *Petition on Ground of Wife's Adultery—Denial—Alimony pendente lite—Allegation by Husband of Maintenance of Wife by Co-respondent—Denial on Affidavit by Wife—Application by Husband to cross-examine Wife and file Evidence in Petition for Alimony—Leave granted on Condition that no Question be put or Evidence filed going to Issue of Adultery.*

The husband filed a petition for divorce on the ground of the wife's adultery. By her answer the wife denied the adultery and made a counter-charge of cruelty. She then filed a petition for alimony pendente lite, which the husband answered by alleging that the wife was being maintained by the co-respondent. The wife filed an affidavit denying this, and an order for alimony pendente lite was made by the registrar. On the application of the husband an order was made by Bargrave Deane J. suspending the order for alimony and giving the husband leave to cross-examine the wife on her affidavit and to file further evidence. The wife appealed on the ground that to allow the cross-examination upon an interlocutory proceeding would prejudice the fair trial of the issue of adultery in the divorce suit.

The Court of Appeal varied the order by directing that the leave to cross-examine and file further evidence should be subject to the condition that no question should be put in cross-examination or affidavit filed or used which directly or indirectly went to the issue of adultery. BASS *v.* BASS - - - **C. A. 17**

8. —— *Practice—Adultery of Petitioner—Pleading—Form of Petition and Prayer—Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 31—*Discretion of the Court to grant Decree of Dissolution of Marriage.*

A petitioner who intends to ask the Court to exercise the discretion conferred by s. 31 of the Matrimonial Causes Act, 1857, by granting a decree dissolving the marriage, although the petitioner has during the marriage been guilty of adultery, must set out in the body of the petition the misconduct which the Court is requested to excuse, and must, in the prayer at the conclusion of the petition, specifically ask that the discretion may be exercised. KING *v.* KING - - - - **Bargrave Deane J. 88**

DOCUMENTS—Prize Court—Military hospital-ship—User for other purposes—Signalling vessel—Spoliation of documents - - - - - - **129**
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DOMICIL — Administration — Alien enemies — Foreign domicil — Custodian — Public Trustee—Limited grant to attorney of next of kin—Disposal of residue - **126**
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ENEMY—Prize Court.
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EVIDENCE—Divorce—Alimony pendente lite—Allegation by husband of maintenance of wife by co-respondent — Cross-examination- - - - - - **17**
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—— Divorce — Cross-examination — Suggested act of adultery, not charged in petition —Question excluded - - - **83**
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—— Husband and wife—Desertion—Corroboration — Allegation of marital intercourse - - - - - - - **122**
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—— Prize Court—Evidence in prize cases—Contraband, Absolute and conditional—Continuous voyage—Ultimate hostile destination — Orders in Council of August 20 and October 29, 1914 - **215**
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—— Probate—Several documents—Execution—Presumption: "Omnia praesumuntur rite esse acta"—Rebuttal—Evidence—Surrounding circumstances - - **211**
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EVIDENCE FURTHER AMENDMENT ACT, 1869 - - - - - - - **83**
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EXECUTION — Probate—Several documents—Execution — Presumption: "Omnia praesumuntur rite esse acta"—Rebuttal — Evidence — Surrounding circumstances - - - - - - **211**
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FREIGHT—Prize Court—Outbreak of hostilities —Enemy cargo on British vessel—Definition of "port" - - - **26**
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HARBOUR—Ship—Collision—Barge sunk by negligence of steamship—Abandonment of wreck—Action by Harbour Board against owners of steamship — Obstruction to navigation—Expense of removing wreckage - - - **111**
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HOSPITAL — Prize Court — Military hospital-ship—User for other purposes—Signalling vessel—Spoliation of documents
See PRIZE COURT. 5. **129**

HUSBAND AND WIFE— *Desertion—Appeal by Husband—Poor Person—Order XVI., r. 29—Wife's Costs—Practice—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

The fact that a husband, who successfully appeals from an order of justices under the Summary Jurisdiction (Married Women) Act, 1895, has been admitted as a poor person is no ground for departing from the usual practice of allowing the wife her costs of appearing in support of an order made by the Court below.

Order XVI., r. 29, gives the Court power to make an order against the husband for the wife's costs. HOPE *v.* HOPE - - - **Div. Ct. 125**

2. —— *Desertion—Evidence—Corroboration —Allegation of Marital Intercourse—Summary Jurisdiction (Married Women) Act*, 1895 (58 & 59 *Vict. c.* 39).

The Court ought not to act upon the uncorroborated evidence of one spouse, alleging marital intercourse at a material date, especially if such evidence is contradicted by the other spouse. JOSEPH *v.* JOSEPH - - - **Div. Ct. 122**

INTESTACY—Probate—Administration—Alien enemies next of kin—"Special circumstances"—Grants to be taken by the Public Trustee as custodian - **86**
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JURISDICTION—Prize Court.
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—— Summary Jurisdiction (Married Women) Act, 1895 - - - - **122, 125**
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KING'S PROCTOR — Divorce — Costs — Wife's petition — King's Proctor's plea — No answer—No evidence of separate estate —Petitioner condemned in costs - **194**
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LONDON—Shipping — Collision — Steam vessel turning—Sound signals—Port of London By-laws - - - - **200**
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MAINTENANCE—Divorce—Alimony pendente lite—Allegation by husband of maintenance of wife by co-respondent—Evidence—Cross-examination - **17**
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MAINTENANCE—*continued.*
—— Divorce—Petition for reduction—Consent order—Power to vary - - - 105
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MARRIAGE—Divorce.
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MARRIED WOMAN.
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MAXIM—"Omnia praesumuntur rite esse acta"
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NEXT OF KIN—Alien enemies—Probate—Administration—Intestacy—"Special circumstances"—Grants to be taken by the Public Trustee as custodian - 86
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NUISANCE—Wreck — Abandonment of — Expense of removing wreckage - 111
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NULLITY OF MARRIAGE.
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ORDERS IN COUNCIL OF AUGUST 20 AND OCTOBER 29, 1914 - - - 215
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PLEADING—Divorce—Adultery of petitioner—Practice—Form of petition and prayer—Discretion of the Court - - 88
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PLEDGE—Prize Court—Cargo — Enemy property—Claim by pledgees - - 52
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PORT—Prize Court—Jurisdiction—Outbreak of hostilities — Definition of "port"—Freight - - - - - - 26
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PORT OF LONDON BY-LAWS, 1914, rr. 23, 27
See SHIPPING. 2. 200

PRACTICE—Divorce.
See under DIVORCE.

—— Prize Court.
See under PRIZE COURT.

—— Probate.
See under PROBATE.

PRIZE COURT—*British Ship—Cargo shipped by Neutral before War declared or imminent—Ship on High Seas when War declared—Documents of Title refused by German Buyer—Advances by Neutral Banker.*

A cargo shipped under a c.i.f. contract by a neutral to a German buyer on a British vessel before the declaration of, or imminence of, war between Great Britain and Germany *held* not to be subject to seizure and condemnation by the Prize Court, the property in the goods not having passed to the enemy subject, the documents representing the goods not having been taken up by the German buyer, and money having been advanced to the neutral seller on the faith of the documents by a neutral banker.

Questions as to liability for seizure of enemy goods on British vessels discussed. THE "MIRAMICHI" - **Sir Samuel Evans, Pres. 71**

2. —— *Cargo—Enemy Property—Claim by Pledgees.*

The Prize Court does not recognize the claim of a pledgee of cargo captured at sea, the legal property in which was at the time of capture in an enemy subject. THE "ODESSA." THE "CAPE CORSO" - **Sir Samuel Evans, Pres. 52**

3. —— *Evidence in Prize Cases—Contraband, Absolute and Conditional—Continuous Voyage—Ultimate Hostile Destination—Orders in Council of August* 20 *and October* 29, 1914.

In prize proceedings the Court is not governed or limited by the strict rules of evidence which bind our municipal courts, as it has always been deemed right to recognize well known facts which have come to light in other cases or as matters of public reputation: see per Lord Stowell in *The Rosalie and Betty* (1800) 2 C. Rob. 343, and the judgment in an American authority, *The Stephen Hart* (1863) Blatch. Prize Cases, 387, at p. 403. On the other hand, when any presumptions or inferences have to be considered, any concealment or misdescription, or device calculated and intended by neutrals to deceive and to hamper belligerents in their undoubted right of search for contraband, will press heavily against those adopting such courses. Neutrals are expected to conduct their neutral trade during war not only without having recourse to fraud or false papers, but with candour and straightforwardness, that is to say (in the words of the American Supreme Court), "Belligerents are entitled to require of neutrals a frank and bona fide conduct." Hence the Court came to the conclusion that the use of the word "gum" in one of the ship's papers in this case was not an accurate commercial description, and its use in the manifest instead of the appropriate commercial description of "rubber," or various qualities of rubber by their commercial names, was adopted in order to avoid the inconvenience or difficulties which would result from a search and possible capture. The Court further found that the charterers of the vessel were responsible for the misdescription and that the sale of the goods in question to one consignee and the purchase and payment for them by him were honest business transactions, though, in respect of another parcel, the Court held that the alleged purchaser had not made out his claim to be the

PRIZE COURT—*continued.*

owner of the goods, that he knew of the description "gum" being applied to them, that the rubber was on its way to enemy territory through the German Consul at Landskrona in Sweden, and that rubber having been declared absolute contraband the parcel in question was confiscable.

The doctrine of continuous voyage or transportation, both in relation to carriage by sea and to carriage over land, became part of the law of nations prior to the commencement of the present war, and, in applying the principles of international law to the doctrine, regard must be had to the circumstances of the times, including "the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it": see *The Jonge Margaretha* (1799) 1 C. Rob. 189; the result being that the Court, in respect of the present cases before it, was not restricted in its vision to the primary consignment of goods from New York to the neutral port of Copenhagen, but was entitled and bound, when the doctrine was applied to the carriage of contraband, to take a more extended outlook in order to ascertain whether this neutral destination was merely ostensible, and, if so, what the real ultimate destination was [see *The William* (1806) 5 C. Rob. 385; *The Bermuda* (1865) 3 Wall. 514], for according to the views of Bluntschli, "If the ships or goods are sent to the destination of a neutral port only the better to come to the aid of the enemy, there will be contraband of war, and confiscation will be justified."

The consignment to "order or assigns," without naming any consignee, is a circumstance which has been regarded as important *in time of war* in determining the real or ostensible destination at the neutral port.

Guided by the above considerations, the President (Sir Samuel Evans) held that the cargoes of the four vessels before the Court (other than the portions acquired by persons in Scandinavia whose claims were allowed) were not destined for consumption or use in Denmark or intended to be incorporated into the general stock of that country by sale or otherwise; that Copenhagen was not the real bona fide place of delivery, but that the cargoes were, by the intention of the shippers, on their way, at the time of capture, to German territory as their actual and real destination, and that, in the circumstances, the cargoes must be condemned as lawful prize, for, from the facts proved, and the reasonable inferences from them, it was to be presumed (whether either or both the Orders in Council of August 20 and October 29, 1914, were deemed effective and binding, or not) that these goods were destined for the use of the German Government or its naval or military forces, and, further, that if the conclusions arrived at were only accurate as to a substantial proportion of the goods the whole would be affected, because contraband articles are said to be of an infectious nature, and contaminate the whole cargo belonging to the same owners. THE "KIM." THE "ALFRED NOBEL." THE "BJORNSTERJNE BJORNSON." THE "FRIDLAND" - - **Sir Samuel Evans, Pres. 215**

PRIZE COURT—*continued.*

4. —— *Jurisdiction—Outbreak of Hostilities—Enemy Cargo on British Vessel — Vessel diverted to British Port—Seizure of Oil Cargo as Droits of Admiralty—Part Cargo discharged into Oil Tanks—Definition of "Port"—Freight—Landing and Storing Charges.*

A cargo of refined petroleum oil in bulk, owned by a German company, was shipped at Port Arthur, Texas, on board a British vessel bound for Hamburg. The vessel reached the English Channel after the outbreak of hostilities between Great Britain and Germany, and, at the suggestion of the Lords Commissioners of the Admiralty, her owners diverted her to a port in the United Kingdom (Dartmouth) for orders. From there they ordered her to proceed to Purfleet and there discharge the oil into the tanks of the British company owning the wharf. When the larger part of the cargo had been so discharged an officer of the Customs gave the master of the vessel notice in writing that the whole of the cargo was "placed under detention." On an application by the Crown for the condemnation of the cargo as lawful prize seized in port, and objection taken that the tanks were "on land" and, therefore, not within the jurisdiction of the Prize Court:—

Held by the President (Sir Samuel Evans), that the tanks were, in effect, oil warehouses, and warehouses were included in the definition of a "port." The case, therefore, was within the jurisdiction of the Court, and the whole of the oil cargo was maritime prize subject to seizure as and where it was, at the time the notice was given, whether on board the ship or in the tanks; but the Crown, without admitting liability, consented to pay to the owners of the vessel such pro rata freight as the registrar and merchants should find to be reasonable, as well as the charges of the owners of the oil tanks for landing and storage.

Held, further, that the company owning the oil, being registered and having its place of business in Germany, must be treated, for prize purposes, as an enemy, although the company was in the nature of a combine, as it included, to the extent of 90 per cent. of the shares, Roumanian, Russian, and other companies neutral or allied. THE "ROUMANIAN"

Sir Samuel Evans, Pres. 26

5. —— *Military Hospital-Ship — User for other Purposes — Signalling Vessel—Spoliation of Documents—Geneva Convention*, 1906—*Hague Convention*, 1907, *No.* 10, *art.* 1.

In a claim on behalf of the Imperial German Government for the release of a vessel, the terms of art. 1 of the Hague Convention, 1907, No. 10, were relied upon, by which "Military hospital-ships, that is to say, ships constructed or adapted by States for the particular and sole purpose of aiding the sick, wounded, and shipwrecked, the names of which have been communicated to the belligerent Powers . . . . shall be respected, and may not be captured while hostilities last":—

Held by the President (Sir Samuel Evans), that the vessel in question being an enemy ship must be condemned as lawful prize, for she had

PRIZE COURT—*continued.*

forfeited the protection claimed under the Convention, in that the evidence showed that she was not constructed, adapted, or used for the special and sole purpose of affording aid and relief to the wounded, sick, and shipwrecked, but was adapted and used as a signalling ship for military purposes.

The doctrines of the Prize Courts relating to the spoliation of documents apply in a special sense to vessels claiming to be hospital-ships, and the destruction of the ship's papers, on the eve of capture, will lead to unfavourable inferences. THE "OPHELIA"

Sir Samuel Evans, Pres. 129

6. —— *Owner of Enemy Merchant Ship—Practice—Right to appear—Vessel in Enemy "Port" at Outbreak of Hostilities — Vessel encountered and captured "at sea" — Hague Convention No. VI.*, 1907.

The question whether a uniform rule as to the right of an enemy owner to appear ought to prevail in all cases of claimants who may be entitled to protection or relief, whether partial or otherwise, is not a matter of international law, but of the practice of the Court, and, as by Order XLV. of the Prize Court Rules, 1914, in cases not provided for by the Rules, "the practice of the late High Court of Admiralty of England in prize proceedings shall be followed, or such other practice as the President may direct":—

Held by the President (Sir Samuel Evans), that the practice of the Court shall be, that whenever an alien enemy conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions of 1907, he shall be entitled to appear as a claimant, and to argue his claim before this Court, the grounds of his claim being stated in the affidavit to lead to appearance required to be filed under Order III., r. 5, of the above Rules.

Shortly after the declaration of war between Great Britain and Germany, a German merchant sailing vessel, owned by her master, a German subject, was captured in the Firth of Forth by one of His Majesty's cruisers and taken into Leith. It was contended on behalf of the Crown that the vessel was captured "at sea." On the other hand, it was urged that the vessel was seized within the port of Leith, and, alternatively, that she was taken within territorial waters, and not "on the high seas," and, therefore, was not confiscable, but only liable to detention:—

Held by the President, that the vessel was captured "at sea" and liable to condemnation as lawful prize, for the word "port," as used in the Hague Conventions, does not mean the "fiscal" port, which may cover a considerable area and include other ports, but must be construed in its usual and limited popular or commercial sense as a place where ships are in the habit of coming for the purpose of loading or unloading, embarking or disembarking, and, therefore, the vessel was not seized in any "port" so as to limit the right of the captor to detention only, and the question whether the

PRIZE COURT—*continued.*

vessel was in territorial waters at the time of seizure was not material. THE "MÖWE"

Sir Samuel Evans, Pres. 1

PROBATE—*Administration with Will annexed—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special Circumstances*"—*Grant to Strangers.*

The Court, with the consent of all persons interested, made a grant of letters of administration, with the will of the deceased annexed, under s. 73 of the Probate Act, 1857, to persons named as executors in another testamentary document which was pronounced against and probate of which was revoked. IN THE ESTATE OF WATKIN. WHITLARK *v.* WHITE

Sir Samuel Evans, Pres. 24

2. —— *Practice — Administration — Alien Enemies—Foreign Domicil—Trading with the Enemy Amendment Act*, 1914 (5 *Geo.* 5, *c.* 12)—*Custodian—Public Trustee—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—"*Special Circumstances*"—*Limited Grant to Attorney of Next of Kin—Disposal of Residue.*

Limited grants to alien enemies domiciled abroad were under special circumstances allowed to pass, under s. 73 of the Probate Act, 1857, to a British subject, domiciled and resident here, as attorney for next of kin resident abroad, subject to restrictions as to the disposal of the residue.

The Court (Sir Samuel Evans, President), nevertheless, expressed the opinion, as reported in the case of *In the Estate of Schiff* [1915] P. 86, that, as a general rule, it was advisable, in the public interest, that the Public Trustee, as custodian, should take the grants in such cases. IN THE ESTATE OF GRUNDT. IN THE ESTATE OF OETL - - - **Sir Samuel Evans, Pres. 126**

3. —— *Practice—Administration—Intestacy—Alien Enemies Next of Kin—"Special Circumstances"—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Trading with the Enemy (Amendment) Act*, 1914 (5 *Geo.* 5, *c.* 12), *s.* 2, *sub-s.* 2—*Grants to be taken by the Public Trustee as Custodian.*

In cases where persons entitled to the assets of a deceased person are alien enemies, the practice laid down now and for the future is that the Public Trustee, as custodian, shall take a grant of administration, by reason of the "special circumstances" under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77). IN THE ESTATE OF SCHIFF - **Bargrave Deane J. 86**

4. —— *Several Documents—Execution—Presumption: "Omnia praesumuntur rite esse acta"—Rebuttal—Evidence — Surrounding Circumstances.*

In the absence of conclusive evidence as to the execution of a testamentary paper containing no attestation clause, the Court is entitled to have regard to the surrounding circumstances both in connection with the document itself and outside of it.

In the Goods of Frances Peverett [1902] P. 205 distinguished. IN THE ESTATE OF STRONG. STRONG *v.* HADDEN

Sir Samuel Evans, Pres. 211

PUBLIC TRUSTEE.

See under TRUSTEE.

REBUTTAL — Probate — Several documents — Execution — Presumption: "Omnia praesumuntur rite esse acta"—Evidence —Surrounding circumstances - **211**
See PROBATE. 4.

RULES OF THE SUPREME COURT, ORDER XVI., r. 29 - - - - **125**
See HUSBAND AND WIFE. 1.

SALVAGE—Construction of contract—Claim by tug owner against cargo owner—Agreement between shipowner and tug owner as to "no salvage charges"—Protection of seamen against abandonment of right to salvage - - - - - - **290**
See SHIPPING. 3.

SEAMEN — Salvage — Protection of seamen against abandonment of right to salvage - - - - - - **290**
See SHIPPING. 3.

SEPARATE ESTATE — Divorce—Costs—Wife's petition — King's Proctor's plea — No answer—No evidence of separate estate —Petitioner condemned in costs - **194**
See DIVORCE. 1.

SEPARATION DEED — Divorce — Desertion — Husband's previous threat to break up the home—Stoppage of payments under the deed - - - - - - **288**
See DIVORCE. 2.

SHIPPING—*Collision—Barge sunk by Negligence of Steamship—Abandonment of Wreck—Action by Harbour Board against Owners of Steamship—Obstruction to Navigation—Nuisance —Expense of removing Wreckage — Harbours, Docks and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 56—*Southampton Harbour Act*, 1863 (26 & 27 *Vict. c. cxix.*), *ss.* 32, 49.

Through the negligence of the defendants' servants a collision occurred in the port of Southampton between the defendants' steamship and a barge, with the result that the barge sank. The owners and underwriters of the barge having abandoned her, the statutory harbour authority incurred expenses in lighting and buoying the wreck and subsequently removing the obstruction by blowing it up. In an action brought by the harbour authority against the owners of the steamship to recover the expenses so incurred :—

Held by the President (Sir Samuel Evans), that the defendants (the owners of the steamship) were liable to make good to the plaintiffs (the harbour authority) the expenses incurred by them whether the case was regarded from the point of view of the breach of duty or negligence of the defendants or from that of a public nuisance caused through their fault. THE "ELLA" - **Sir Samuel Evans, Pres. 111**

SHIPPING—*continued.*

2. —— *Collision — Steam Vessel turning — Sound Signals—Port of London By-laws*, 1914, *rr.* 23, 27.

Those in charge of the defendants' steam vessel, being about to bring up in Gravesend Reach, gave the four short blasts of the steam whistle required by r. 23 of the Port of London By-laws, 1914, to signify that they were about to turn the vessel round, and followed this with one short blast to indicate that they were turning the vessel with her head to starboard. These signals were repeated for the information of an approaching vessel (the plaintiffs' steamship) which was overtaking them ; but on putting the engines astern, in the course of the turning movement, the pilot in charge of the defendants' vessel did not give three short blasts under r. 27. In an action of damage by collision :—

Held by Bargrave Deane J.,—whilst finding both vessels to blame in different proportions for bad look-out and other defects in their navigation—that the omission on the part of the pilot of the defendants' vessel to give the three-blast signal, when putting the engines full speed astern, was the primary cause of the collision, as, if that signal had been given, those in charge of the plaintiffs' vessel would have had notice, particularly valuable at night, that the other vessel was moving bodily astern to the extent, in this case, of a length and a half.

Reference was made to the case of *The "Harberton"* [1913] P. 149, where, in the circumstances, the three-blast signal was not deemed requisite. THE "ANCONA"
Bargrave Deane J. 200

3. —— *Salvage—Construction of Contract—Claim by Tug Owner against Cargo Owner—Agreement between Shipowner and Tug Owner as to "no salvage charges"—Protection of Seamen against Abandonment of Right to Salvage—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 156.

Where a vessel carrying cargo was being towed under a contract made between the owners of the tug and the owners of the vessel in tow on the terms of "no cure no pay, no salvage charges," and, before the towage came to an end, the vessel was in danger, and salvage services were rendered by the tug to ship and cargo :—

Held by the Court of Appeal (Swinfen Eady, Phillimore, and Bankes LJJ.), affirming the decision of the President (Sir Samuel Evans) [1915] P. 90, that the owners of the tug and her master and crew were entitled to maintain an action to recover salvage remuneration from the owners of the cargo. THE "LEON BLUM"
C. A. 290

—— Prize Court.
See under PRIZE COURT.

SOUND SIGNALS—Shipping—Collision—Steam vessel turning - - - - **200**
See SHIPPING. 2.

SOUTHAMPTON HARBOUR ACT, 1863, ss. 32, 49 - - - - - - - **111**
See SHIPPING. 1.

STATUTES:—

1847.

10 & 11 Vict. c. 27, s. 56—*Harbours, Docks and Piers Clauses* - - - **111**
See SHIPPING. 1.

STATUTES—*continued.*

1857.

20 & 21 Vict. c. 77, s. 73—*Probate* **24, 86, 126**
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20 & 21 Vict. c. 85, s. 22—*Matrimonial Causes* - - - - - - **184**
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—— —— s. 31 - - - - - **88, 207**
See DIVORCE. 5, 8.

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1869.

32 & 33 Vict. c. 68—*Evidence Further Amendment* - - - - - - - **83**
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41 & 42 Vict. c. 19, s. 2—*Matrimonial Causes* **194**
See DIVORCE. 1.

1894.

57 & 58 Vict. c. 60, s. 156—*Merchant Shipping* **290**
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1895.

58 & 59 Vict. c. 39—*Summary Jurisdiction (Married Women)* - - **122, 125**
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TRADING WITH THE ENEMY—Administration—Alien enemies—Foreign domicil—Custodian—Public Trustee—"Special circumstances" — Limited grant to attorney of next of kin—Disposal of residue - - - - - - **126**
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TRADING WITH THE ENEMY—*continued.*

—— Probate — Administration — Intestacy — Alien enemies next of kin—"Special circumstances"—Grants to be taken by the Public Trustee as custodian - **86**
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TRUSTEE — Administration — Alien enemies — Foreign domicil — Trading with the enemy — Custodian — Public Trustee—"Special circumstances" — Limited grant to attorney of next of kin—Disposal of residue - - - **126**
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—— Public Trustee — Probate—Administration — Intestacy — Alien enemies next of kin—"Special circumstances"—Grants to be taken by the Public Trustee as custodian - - - - - - **86**
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TUG—Salvage—Construction of contract—Protection of seamen against abandonment of right to salvage - - - **290**
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WAR—Prize Court.
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—— "Special circumstances" - **24, 86, 126**
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WRECK — Ship — Collision — Barge sunk by negligence of steamship — Abandonment of wreck—Action by Harbour Board against owners of steamship—Obstruction to navigation—Expense of removing wreckage - - - **111**
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